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Wednesday  
May 13, 1987



# Federal Register

**Briefings on How To Use the Federal Register—**  
For information on briefings in Washington, DC, Chicago,  
IL, and Boston, MA, see announcement on the inside  
cover of this issue.



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**How To Cite This Publication:** Use the volume number and the page number. Example: 52 FR 12345.

## THE FEDERAL REGISTER

### WHAT IT IS AND HOW TO USE IT

- FOR:** Any person who uses the Federal Register and Code of Federal Regulations.
- WHO:** The Office of the Federal Register.
- WHAT:** Free public briefings (approximately 2 1/2 hours) to present:
1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
  2. The relationship between the Federal Register and Code of Federal Regulations.
  3. The important elements of typical Federal Register documents.
  4. An introduction to the finding aids of the FR/CFR system.
- WHY:** To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

### WASHINGTON, DC

- WHEN:** June 9, at 9 a.m.  
**WHERE:** Office of the Federal Register,  
 First Floor Conference Room,  
 1100 L Street NW., Washington, DC.
- RESERVATIONS:** Gertrude E. Belton, 202-523-5237

### CHICAGO, IL

- WHEN:** July 8, at 9 a.m.  
**WHERE:** Room 204A,  
 Everett McKinley Dirksen Federal Building,  
 219 S. Dearborn Street,  
 Chicago, IL.
- RESERVATIONS:** Call the Chicago Federal Information Center, 312-353-0339.

### BOSTON, MA

- WHEN:** July 15, at 9 a.m.  
**WHERE:** Main Auditorium, Federal Building,  
 10 Causeway Street,  
 Boston, MA.
- RESERVATIONS:** Call the Boston Federal Information Center, 617-565-8129

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# Presidential Documents

Title 3—

Proclamation 5651 of May 8, 1987

The President

National Digestive Diseases Awareness Month, 1987

By the President of the United States of America

## A Proclamation

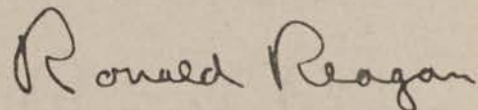
Digestive diseases represent one of our Nation's significant health problems. Each year digestive diseases affect roughly 20 million Americans. Their cost to Americans in terms of surgery, hospitalization, and time away from work is reckoned in tens of billions of dollars; but their cost in terms of suffering and mortality is incalculable.

Fortunately, private and public support has made continuing research into digestive diseases possible. In addition, concerned organizations—including the Digestive Diseases National Coalition, the National Digestive Diseases Advisory Board, the National Digestive Diseases Education and Information Clearinghouse, and the National Institute of Diabetes and Digestive and Kidney Diseases—have been conducting a national public awareness program about these serious diseases and their prevention.

In recognition of the importance of efforts to combat digestive diseases, the Congress, by Public Law 100-32, has designated the month of May 1987 as "National Digestive Diseases Awareness Month" and authorized and requested the President to issue a proclamation in observance of this month.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim the month of May 1987 as National Digestive Diseases Awareness Month. I urge the people of the United States and educational, philanthropic, scientific, medical, and health care organizations and professionals to participate in appropriate activities to encourage further research into the causes and cures of all types of digestive disorders.

IN WITNESS WHEREOF, I have hereunto set my hand this eighth day of May, in the year of our Lord nineteen hundred and eighty-seven, and of the Independence of the United States of America the two hundred and eleventh.





## Presidential Documents

Proclamation 5652 of May 9, 1987

### Jewish Heritage Week, 1987

By the President of the United States of America

#### A Proclamation

It is truly fitting that Americans pause each year to celebrate Jewish heritage, a tradition measured in millennia and one that has given much to our land. American Jews have helped build our Nation, enriching our ideals, fighting for our freedom, and making significant achievements in the arts, labor, business, academia, medicine, and every segment of American life.

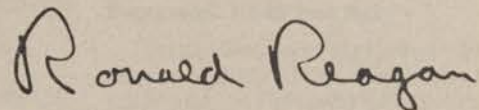
This time of year calls us to reflection and remembrance about Jewish heritage. The observance of Passover tells the story of the passage from bondage to freedom and rekindles hope for mankind. The National Days of Remembrance of victims and survivors of the Holocaust and commemorations of the anniversary of the Warsaw Ghetto Uprising solemnly remind us that the shining glory and goodness of the spirit can arise from unutterable evil and tragedy—and that the words "Never Again" must always be our guide.

American Jews have given of their heart and soul for an America that has ever been a haven for the oppressed. That is reason for every American to rejoice and to remember.

The Congress, by House Joint Resolution 67, has designated the period of May 3 through May 10, 1987, as "Jewish Heritage Week" and authorized and requested the President to issue a proclamation in observance of this event.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim the period of May 3 through May 10, 1987, as Jewish Heritage Week. I call upon the people of the United States, interested organizations, and Federal, State, and local government officials to observe this week with appropriate activities and ceremonies.

IN WITNESS WHEREOF, I have hereunto set my hand this ninth day of May, in the year of our Lord nineteen hundred and eighty-seven, and of the Independence of the United States of America the two hundred and eleventh.



[FR Doc. 87-11025

Filed 5-11-87; 2:50 pm]

Billing code 3195-01-M

Presidential Documents

Transmitted to the Senate May 11, 1955

John F. Kennedy, 1955

to the President of the United States of America

A Memorandum

For the President of the United States of America: This memorandum is submitted to you for your information and guidance. It contains a summary of the results of the investigation conducted by the Special Committee on the Assassination of President John F. Kennedy, which was held in the White House on May 11, 1955.

The results of the investigation are as follows: The Special Committee has determined that the assassination of President John F. Kennedy was the result of a conspiracy involving several individuals, including Lee Harvey Oswald, who was the assassin. The Committee has also determined that the assassination was planned and executed in the city of Dallas, Texas, on November 22, 1963. The Committee has further determined that the assassination was motivated by political and personal reasons.

The Committee has also determined that the assassination was a major event in the history of the United States, and that it has had a profound impact on the lives of the American people. The Committee has further determined that the assassination was a tragedy, and that it was a crime against the American people. The Committee has also determined that the assassination was a crime against the United States, and that it was a crime against the world.

The Committee has further determined that the assassination was a crime against the American people, and that it was a crime against the United States, and that it was a crime against the world. The Committee has also determined that the assassination was a crime against the American people, and that it was a crime against the United States, and that it was a crime against the world.

Respectfully,  
John F. Kennedy

# Rules and Regulations

Federal Register

Vol. 52, No. 92

Wednesday, May 13, 1987

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510. The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## MERIT SYSTEMS PROTECTION BOARD

### 5 CFR Part 1201

#### Practices and Procedures; Change in Approved Hearing Locations Based on Realignment of Regional Offices

**AGENCY:** Merit Systems Protection Board.

**ACTION:** Final rule.

**SUMMARY:** The Merit Systems Protection Board (the Board) announces a change in its approved hearing locations as a result of its realignment of the geographical jurisdiction of its regional offices. See 52 FR 10875, April 6, 1987. As a result of the jurisdictional changes, the City of Baltimore, Maryland is no longer a fixed hearing site for the Board's Philadelphia regional office but has been added as a hearing site for its Washington regional office. In addition, the City of Trenton, New Jersey has been added as a fixed hearing site for the Board's Philadelphia regional office. As a result of the jurisdictional changes and changes in approved hearing locations, the Board will be more responsive to the needs of appellant and agency clients.

**EFFECTIVE DATE:** May 13, 1987.

**FOR FURTHER INFORMATION CONTACT:** Michael W. Doherty (202) 653-7980.

#### List of Subjects in 5 CFR Part 1201

Government employees,  
Administrative practice and procedure,  
Civil rights.

Accordingly, 5 CFR Part 1201 is amended as set forth below:

### PART 1201—PRACTICES AND PROCEDURES

1. The authority for Part 1201 continues to read:

Authority: 5 U.S.C 1205 and 7701(j).

2. Appendix III to 5 CFR 1201 is amended by revising the approved hearing locations for the Philadelphia regional office and the Washington regional office to read as follows:

#### Appendix III to Part 1201—Approved Hearing Locations

##### Philadelphia Region

Philadelphia, Pennsylvania  
Harrisburg, Pennsylvania  
Pittsburgh, Pennsylvania  
Wilkes-Barre, Pennsylvania  
Trenton, New Jersey  
Dover, Delaware  
Norfolk, Virginia  
Richmond, Virginia  
Roanoke, Virginia  
Charleston, West Virginia  
Morgantown, West Virginia

##### Washington Region

Bailey's Crossroads, Virginia  
Washington, DC  
Baltimore, Maryland.

Dated: May 8, 1987.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 87-10899 Filed 5-12-87; 8:45 am]

BILLING CODE 7400-01-M

## FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

### 5 CFR Part 1605

#### Error Correction Regulations

**AGENCY:** Federal Retirement Thrift Investment Board.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Federal Retirement Thrift Investment Board (the Board) was established by Pub. L. 99-335 (June 6, 1986), the Federal Employees' Retirement System Act of 1986, 1986 U.S. Code Cong. & Ad. News (100 Stat. 514) (codified principally at 5 U.S.C. 8401-8479), as amended by Pub. L. 99-509, the Omnibus Budget Reconciliation Act of 1986, and Pub. L. 99-556, the Federal Employees' Retirement System Technical Corrections Act of 1986, to administer the Thrift Savings Plan for Federal employees. Regulations of the Board are contained in Title 5, CFR, Chapter VI, Parts 1600 through 1699. The Executive Director of the Board is publishing in Part 1605 interim

regulations concerning procedures governing the correction of errors which occur during the administration of the Thrift Savings Plan.

**DATES:** Interim rules effective April 1, 1987; comments must be received by July 15, 1987.

**ADDRESS:** Comments may be sent to: John J. O'Meara, Federal Retirement Thrift Investment Board, Benjamin Franklin Station, P.O. Box 511, Washington, DC 20044.

**FOR FURTHER INFORMATION CONTACT:** John J. O'Meara, (202) 653-2573.

**SUPPLEMENTARY INFORMATION:** These regulations govern procedures for correcting errors which may occur during the course of processing data on employee participation in the Thrift Savings Plan. These errors may occur as a consequence of action, or lack of action, on the part of an employee's or Member's agency or on the part of the Board. In addition, these regulations specify the action to be taken where an employee or Member fails to participate, or is delayed in participating, in the Thrift Savings Plan for reasons beyond his or her control and where there has not been an error on the part of the agency. The regulations are effective retroactive to April 1, 1987, the statutory commencement date of the Thrift Savings Plan.

#### Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities. They will affect only internal government procedures for correcting errors involving employee participation in the Thrift Savings Plan.

#### Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act of 1980.

#### Waiver of Notice of Proposed Rulemaking and 30-Day Delay of Effective Date

Pursuant to 5 U.S.C. 553(b)(B) and (d)(3), I find that good cause exists for waiving the general notice of proposed rulemaking and for making these regulations effective in less than 30 days. These error correction procedures are being issued as interim regulations because the statutory commencement of

the Thrift Savings Plan was April 1, 1987, and it is necessary for the Board to have uniform procedures in place in order to correct errors relating to employee participation in this program.

#### List of Subjects in 5 CFR Part 1605

Administrative practice and procedure, Employee benefit plans, Government employees, Pensions, Retirement.

Federal Retirement Thrift Investment Board.  
Francis X. Cavanaugh,  
Executive Director.

Title 5 of the Code of Federal Regulations is amended to add Part 1605 to Chapter VI to read as follows:

### PART 1605—CORRECTION OF ADMINISTRATIVE ERRORS

#### Sec.

- 1605.1 Definitions.
- 1605.2 Failure to participate or delay in participation.
- 1605.3 Insufficient deduction or contribution.
- 1605.4 Excess deduction or contribution.
- 1605.5 Delayed or erroneous posting of contributions or earnings.
- 1605.6 Agency allocation to incorrect account.
- 1605.7 Employees ineligible to receive government contributions or to participate.
- 1605.8 Claim procedure; agency or Board initiative; time limitation.

Authority: 5 U.S.C. 8351 and 8474.

#### § 1605.1 Definitions.

Terms used in this part shall have the following meanings:

"Account" means an employee's account with the Thrift Savings Plan.

"Agency" means the organization which took an action or committed an error with respect to an employee's participation in the Thrift Savings Plan and the organization which is responsible for taking corrective action, but does not include the Thrift Savings Plan Recordkeeper (Recordkeeper).

"Board" means the Federal Retirement Thrift Investment Board.

"Employee" means "employee" as defined in 5 U.S.C. 8401(11) and 8331(1) and "Member" as defined in 5 U.S.C. 8401(20) and 8331(2).

"Executive Director" means the Executive Director of the Federal Retirement Thrift Investment Board, as defined in 5 U.S.C. 8401(13) and as further described in 5 U.S.C. 8474.

"Recordkeeper" means the National Finance Center, U.S. Department of Agriculture, P.O. Box 61500, New Orleans, Louisiana 70161-1500.

#### § 1605.2 Failure to participate or delay in participation.

(a) *Actions eligible for correction.* (1) If an employee fails to participate or is delayed in participating in the Thrift Savings Plan because of reasons beyond his or her control, but not because of action or lack of action by the agency, then prospective corrective action, at the employee's request, shall be taken in accordance with paragraph (b)(1) of this section.

(2) If an employee or Member fails to participate or is delayed in participating in the Thrift Savings Plan because of reasons that are attributable to his or her agency, the error will be corrected in accordance with paragraph (b)(2) of this section.

(b) *Correction procedures.* (1) A failure to participate or delay in participation pursuant to paragraph (a)(1) of this section shall be corrected effective not later than the first pay period beginning after the agency accepts the employee's election form.

(2) A failure to participate or delay in participation pursuant to paragraph (a)(2) of this section shall be corrected in the following manner:

(i) The agency shall correct the employee's payroll records immediately in order to assure accurate Thrift Savings Plan deductions in subsequent pay periods.

(ii) The agency shall, at the employee's election, deduct the amount attributable to the error from the employee's net payable salary according to an equal payment schedule agreed to by the employee. The agency may limit the number of pay periods over which the correction may be made; however, such limit may not be less than two times the number of pay periods over which the error occurred. The payment schedule must begin no later than the pay period following the date of the agreed upon schedule and it may not exceed four times the number of pay periods over which the error occurred.

(iii) A decision by the employee to contribute the retroactive amount shall be deemed irrevocable except where the employee or Member separates from Government service. In case of separation from Government service, the employee may terminate the retroactive contribution or accelerate the contribution by lump sum payment from the final salary payment. In case of death, the retroactive contribution of the deceased employee will be terminated as of the final salary payment.

(iv) In accordance with the payment schedule agreed to by the employee, the agency shall contribute to the employee's Thrift Savings Plan account the government matching amount which

the agency would have been required to contribute had the error not occurred.

(v) The one percent basic government contribution, if due, will be contributed to the employee's Thrift Savings Plan account during the first pay period of the repayment schedule.

(vi) No earnings will be paid into an employee's Thrift Savings Plan account that would have accrued to such account but for the error causing the delay or failure of participation.

#### § 1605.3 Insufficient deduction or contribution.

(a) *Errors eligible for correction.* An error of insufficient employee deduction shall be eligible for correction if an employee designated an amount or rate to be deducted from his or her net payable salary as an allotment to the Thrift Savings Plan on an election form that was accepted by the appropriate agency office and the amount or rate designated was not deducted, in whole or in part, and credited to the employee's account for the eligible pay periods because of agency error. An error of insufficient government contribution shall be corrected in accordance with this section.

(b) *Correction procedure.* In the event that there is an error eligible for correction pursuant to paragraph (a) of this section, the following procedure shall apply:

(1) The agency shall correct the employee's payroll records immediately in order to assure accurate Thrift Savings Plan deductions in subsequent pay periods.

(2) The agency shall, at the employee's election, deduct the amount attributable to the error from the employee's net payable salary according to an equal payment schedule agreed to by the employee. The agency may limit the number of pay periods over which the correction may be made; however, such limit may not be less than two times the number of pay periods over which the error occurred. This payment schedule must begin no later than the pay period following the date of the agreed upon schedule and it may not exceed four times the number of pay periods over which the error occurred.

(3) A decision by the employee to contribute the retroactive amount shall be deemed irrevocable except where the employee separates from Government service. In case of separation from Government service, the employee may terminate the retroactive contribution or accelerate the contribution by lump sum deduction from the final salary payment. In case of death, the retroactive contribution of the deceased employee

will be terminated as of the final salary payment.

(4) In accordance with the payment schedule agreed to by the employee, the agency shall contribute to the employee's Thrift Savings Plan account the Government matching contribution which the agency would have been required to contribute had the error not occurred.

(5) Any payment of the one percent contribution will be made to the employee's account not later than the first pay period beginning after the date on which the agency determines that an error occurred.

(6) No earnings will be paid into an employee's Thrift Savings Plan account that would have accrued to such account but for the error causing the underdeduction or failure to deduct.

**§ 1605.4 Excess deduction or contribution.**

(a) *Errors eligible for correction.* An error of overdeduction shall be eligible for correction if a participant designated an amount or rate to be deducted as an allotment to the Thrift Savings Plan on an election form that was accepted by the appropriate agency office and more than the amount designated was deducted and credited to the participant's account because of agency error. This section applies to deductions taken from the pay of an employee who did not elect to contribute. An error of excess government contribution shall also be corrected in accordance with this section.

(b) *Correction procedure.* On discovery of this error, the following actions shall take place no later than the pay period following the agency's discovery of the error:

(1) The agency shall correct the employee's payroll record immediately in order to assure accurate Thrift Savings Plan deductions in subsequent pay periods.

(2) The agency shall forward a summary adjustment record in the amount of the overdeduction of employee and Government contributions to the Recordkeeper to reduce the employee's account as appropriate. One summary adjustment record will be required for each tax year included in the adjustment period.

(3) Subject to paragraph (b)(5) of this section, the agency shall return the overdeducted employee contribution and credit the agency account with the overdeducted government contribution by appropriately crediting the routine transmittal of Plan funds to the Recordkeeper. The Thrift Savings Plan adjustment transaction will be used for this purpose. The Government's

contribution must be returned within one year of the date of the mistake.

(4) Earnings attributable to both the overdeducted employee contribution and excess government contributions which have been paid into the employee's account will remain in the employee's account. In the event that the correction of this error liquidates an employee's account with respect to principal, the earnings attributable to the overdeducted employee contribution and excess government contribution will be transferred to the appropriate undistributed earnings account.

(5) The amounts returned to the employer or the employee pursuant to paragraph (b)(3) of this section shall be reduced to reflect any applicable investment loss.

(6) The employee's agency shall correct its payroll records to reflect correct employee income information.

**§ 1605.5 Delayed or erroneous posting of contributions or earnings.**

If the Board fails to post accurately contributions or earnings to an employee's account, the error will be corrected. This correction shall adjust the employee's account to place the account in the position it would have been but for the Board's error.

**§ 1605.6 Agency allocation to incorrect account.**

(a) *Errors eligible for correction.* If an agency allocates the employee or government contribution of one employee to the account of another employee, the error shall be corrected in accordance with the procedures set forth in paragraph (b) of this section.

(b) *Correction procedures.* On discovery of this error, the following actions will take place no later than the pay period following the agency's discovery of the error.

(1) The agency shall correct the payroll records of the affected employees in order to assure accurate Thrift Savings Plan contributions and deductions in subsequent pay periods.

(2) The agency shall forward a summary adjustment record to the Recordkeeper which identifies the incorrect accounts and the amounts and types of funds which were incorrectly allocated.

(3) Subject to paragraph (b)(4) of this section the Record-keeper will transfer the appropriate amounts and related earnings from the incorrect account to the correct account.

(4) The amounts returned from the incorrect account to the correct account pursuant to paragraph (b)(3) of this section shall be reduced to reflect any applicable investment loss.

(5) The agency shall correct its payroll records to reflect correct income information for each account that was changed in order to correct the error.

**§ 1605.7 Employees ineligible to receive government contributions or to participate.**

(a) In the event that there is a credit of government contributions to an employee who is eligible to make employee contributions but who is ineligible to receive government contributions:

(1) The agency shall recover the government contributions with an appropriate Thrift Savings Plan adjustment transaction;

(2) The Board shall transfer any earnings on the government funds from the employee's account to the appropriate undistributed earnings account.

(b) In the event there is a credit of funds to an employee who is ineligible to participate in the Thrift Savings Plan:

(1) The agency shall return any employee contribution to the employee and recover any agency contribution with an appropriate Thrift Savings Plan adjustment transaction;

(2) The Board shall transfer any earnings on employee contributions and government funds to the appropriate undistributed earnings account.

**§ 1605.8 Claim procedure; agency or Board initiative; time limitation.**

(a) *Agency procedure.* Each agency responsible for processing employee elections to participate in the Thrift Savings Plan shall establish the following procedure which allows an employee to present a claim for correction under this part.

(1) The agency shall review all employee claims in order to determine whether they relate to an error which may have been made by the agency or by the Board. A claim which relates to possible Board errors shall be transmitted by the agency to the Board's Recordkeeper within 10 days of the agency's receipt of a written claim from the employee.

(2) The agency shall review a claim and provide the employee with a decision within 30 days of its receipt of the employee's written claim. The agency's decision shall be in writing and shall contain the following information—

(i) The agency's determination on the claim and the reasons therefor, including references to applicable statutes or regulations;

(ii) In the case of a denial of the claim, in whole or in part, a description of any additional material or information

necessary for the employee to perfect the claim and an explanation of why such material or information is necessary, and

(iii) In the case of a denial of the claim, in whole or in part appropriate information as to the steps to be taken, as set forth below, if the employee wishes to appeal the agency decision on the claim.

(3) Within 30 days after receipt of an agency decision denying a claim, an employee may appeal the agency decision. An appeal shall be in writing and addressed to the agency official designated in the agency's decision. The employee's appeal may contain any document or comments the employee deems relevant to the claim.

(4) The agency shall make a decision on the employee's appeal not later than 30 days after its receipt of the appeal. The agency's decision on the appeal shall be written in an understandable manner and shall include the reasons therefor as well as references to applicable statutes and regulations. If the decision on the employee's appeal is not made within this 30 day time period, or if the decision on the appeal denies the employee's claim, in whole or in part, the employee shall have exhausted his or her administrative remedy and shall be eligible to file suit in the appropriate Federal district court pursuant to 5 U.S.C. 8477. There is no administrative appeal of an agency final decision to the Board.

(b) *Board procedure.* The Board shall provide the following procedure for reviewing claims relating to possible errors on the part of the Board:

(1) On receipt of a claim transmitted by an agency in accordance with paragraph (a)(1) of this section, the Recordkeeper shall review the claim and provide the employee with a decision within 30 days of its receipt of the claim. This decision shall be in writing and shall contain the following information:

(i) The Recordkeeper's determination on the claim and the reasons therefor, including reference to applicable statutes or regulations;

(ii) In the case of a denial of the claim, in whole or in part, a description of any additional material or information necessary for the employee to perfect the claim and an explanation of why such material or information is necessary, and

(iii) In the case of a denial of the claim, in whole or in part, appropriate information as to the steps to be taken, as set forth below, if the employee wishes to appeal the Recordkeeper's decision on the claim.

(2) Within 30 days after the receipt of the Recordkeeper's decision denying a claim, an employee may appeal the decision. The appeal shall be in writing and addressed to the Executive Director, Federal Retirement Thrift Investment Board, Benjamin Franklin Station, Post Office Box 511, Washington, DC 20044, and may contain any documents or comments the employee deems relevant to the claim.

(3) The Executive Director shall make a decision on the employee's appeal not later than 30 days after the Board's receipt of the appeal. This decision shall be written in an understandable manner and shall include the reasons therefor as well as references to applicable statutes and regulations. If the decision on the employee's appeal is not made within this 30 day time period, or if the decision denies the employee's claim, in whole or in part, the employee shall have exhausted his or her administrative remedy and shall be eligible to file suit in the appropriate Federal district court pursuant to 5 U.S.C. 8477.

(c) Agency or Board initiative. Errors or actions covered by this part may be corrected, in the manner and to the extent provided in this part, at the initiative of the agency or of the Board regardless of whether an employee submits a claim pursuant to this section.

(d) Time limitation. An error or action described in this Part shall only be eligible for correction pursuant to paragraphs (a) and (b) of this section for a period of three years from the date on which the employee discovered or should have discovered the error, whichever occurs first.

[FR Doc. 87-11020 Filed 5-12-87; 8:45 am]

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## 5 CFR Part 1631

### Disclosure of Records

**AGENCY:** Federal Retirement Thrift Investment Board.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Federal Retirement Thrift Investment Board (the Board) was established by Pub. L. 99-335 (June 6, 1986), the Federal Employees' Retirement System Act of 1986, 1986 U.S. Code Cong. & Ad. News (100 Stat. 514) (to be codified principally at 5 U.S.C. 8401 through 8479), as amended by Pub. L. 99-509, the Omnibus Budget Reconciliation Act of 1986, and Pub. L. 99-556, the Federal Employees' Retirement System Technical Corrections Act of 1986, to administer the Thrift Savings Plan for Federal

employees. Regulations of the Board are contained in Title 5, CFR, Chapter VI, Parts 1600 through 1699. The Executive Director of the Board is publishing in Part 1631 interim regulations governing procedures for handling requests for records under the Freedom of Information Act (5 U.S.C. 552) and other authorities.

**DATES:** Interim rules effective May 13, 1987; comments must be received on or before July 15, 1987.

**ADDRESS:** Comments may be sent to: John J. O'Meara, Federal Retirement Thrift Investment Board, Benjamin Franklin Station, P.O. Box 511, Washington, DC 20044.

**FOR FURTHER INFORMATION CONTACT:** John J. O'Meara, (202) 653-2573.

**SUPPLEMENTARY INFORMATION:** The Board, as a new agency, is issuing interim regulations which implement the public information provisions of the Freedom of Information Act, as well as provide procedures for access to information and records under other authorities. The Board is an independent establishment located in Washington, DC and it has no field offices. However, the Board does have a recordkeeping responsibility which is performed by contract and the contractor may be located outside of the Washington, DC area. The records maintained for the Board by its contractor are subject to these disclosure regulations. At this time, the recordkeeping contract is held by the National Finance Center, Department of Agriculture, New Orleans, Louisiana.

### Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities. They will affect only internal Board procedures relating to the disclosure of records.

### Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act of 1980.

### Waiver of Notice of Proposed Rulemaking and 30-day Delay of Effective Date

Pursuant to 5 U.S.C. 553 (b)(B) and (d)(3), I find that good cause exists for waiving the general notice of proposed rulemaking and for making these regulations effective in less than 30 days. The Board wishes to have these procedures in existence at the earliest date in order to process requests for

records which are being maintained by the Board at this time.

#### List of Subjects in 5 CFR Part 1631

Administrative practice and procedure, Freedom of Information, and Records. Federal Retirement Thrift Investment Board.

Francis X. Cavanaugh,  
Executive Director.

Title 5 CFR is amended by adding Part 1631 to Chapter VI to read as follows:

### PART 1631—AVAILABILITY OF RECORDS

#### Subpart A—Production or Disclosure of Records Under the Freedom of Information Act, 5 U.S.C. 552

- Sec.
- 1631.1 Definitions.
  - 1631.2 Purpose and scope.
  - 1631.3 Organization and functions.
  - 1631.4 Public reference facilities and current index.
  - 1631.5 Records of other agencies.
  - 1631.6 How to request records—form and content.
  - 1631.7 Initial determination.
  - 1631.8 Prompt response.
  - 1631.9 Responses—form and content.
  - 1631.10 Appeals to the General Counsel from initial denials.
  - 1631.11 Fees to be charged—categories of requesters.
  - 1631.12 Waiver or reduction of fees.
  - 1631.13 Prepayment of fees over \$250.
  - 1631.14 Fee schedule.
  - 1631.15 Information to be disclosed.
  - 1631.16 Exemptions.
  - 1631.17 Deletion of exempted information.
  - 1631.18 Annual report.

#### Subpart B—Production in Response to Subpoenas or Demands of Courts or Other Authorities

- 1631.30 Purpose and scope.
- 1631.31 Production prohibited unless approved by the Executive Director.
- 1631.32 Procedure in the event of a demand for disclosure.
- 1631.33 Procedure in the event of an adverse ruling.

Authority: 5 U.S.C. 552, as amended by Pub. L. 93-502 and Pub. L. 99-570.

#### Subpart A—Production or Disclosure of Records Under the Freedom of Information Act, 5 U.S.C. 552

##### § 1631.1 Definitions.

(a) "Board" means the Federal Retirement Thrift Investment Board.

(b) "Agency" means agency as defined in 5 U.S.C. 552(e).

(c) "Executive Director" means the Executive Director of the Federal Retirement Thrift Investment Board, as defined in 5 U.S.C. 8401(13) and as further described in 5 U.S.C. 8474.

(d) "FOIA" means Freedom of Information Act, 5 U.S.C. 552, as amended.

(e) "General Counsel" means the General Counsel of the Federal Retirement Thrift Investment Board.

(f) "Workday" means those days when the Board is open for the conduct of government business, and does not include Saturdays, Sundays and legal public holidays.

##### § 1631.2 Purpose and scope.

This subpart contains the regulations of the Federal Retirement Thrift Investment Board, implementing 5 U.S.C. 552. The regulations of this subpart describe the procedures by which records may be obtained from all organizational units within the Board. Official records of the Board available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public only as prescribed by this subpart. To the extent that it is not prohibited by other laws the Board also will make available records which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.

##### § 1631.3 Organization and functions.

(a) The Federal Retirement Thrift Investment Board was established by the Federal Employees' Retirement System Act of 1986 (Pub. L. 99-335, 5 U.S.C. 8401 et seq.). Its primary function is to manage and invest the Thrift Savings Fund for the benefit of participating Federal employees and Members of Congress. The Board is responsible for investment of the assets of the Thrift Savings Fund and management of the Thrift Savings Plan. The Board consists of:

- (1) The five part time members who serve on the Board;
- (2) The Office of the Executive Director;
- (3) The Office of Deputy Executive Director;
- (4) The Office of the General Counsel; and
- (5) Officials who are responsible for the following divisions—
  - (i) Finance
  - (ii) External Relations
  - (iii) Employee Relations
  - (iv) Automated Systems
  - (v) Administration

(b) The Board has no field organization, however, it provides for its recordkeeping responsibility by contract and the contractor may be located outside of the Washington, D.C. area. Thrift Savings Plan records maintained for the Board by its contractor are Board records subject to these regulations. Offices are presently located at 1717 H

Street NW., Washington, DC and the mailing address is Benjamin Franklin Station, P.O. Box 511, Washington, DC 20044. Regular office hours are from 9:00 a.m. to 5:30 p.m., Monday through Friday.

##### § 1631.4 Public reference facilities and current index.

(a) The Office maintains a public reading area located in Room 206, 1717 H Street NW., Washington, DC, and makes available for public inspection and copying a copy of all material required by 5 U.S.C. 552(a)(2), including all documents published by the Board in the Federal Register and currently in effect.

(b) The FOIA Officer or his or her designee shall maintain files containing all materials required to be retained by or furnished to the FOIA Officer under this subpart. The materials shall be filed by chronological number of request within each calendar year, indexed according to the exceptions asserted, and, to the extent feasible, indexed according to the type of records requested.

(c) The FOIA Officer shall also maintain a file open to the public, which shall contain copies of all grants or denials of appeals by the Board.

##### § 1631.5 Records of other agencies.

Requests for records that originated in another agency and are in the custody of the Board will be referred to that agency for processing, and the person submitting the request shall be so notified. The decision made by that agency with respect to such records will be honored by the Board.

##### § 1631.6 How to request records—form and content.

(a) A request made under the FOIA must be submitted in writing, addressed to: FOIA Officer, Federal Retirement Thrift Investment Board, Ben Franklin Station, P.O. Box 511, Washington, DC. 20044. The words "FOIA Request" should be clearly marked on both the letter and the envelope.

(b) Any Board employee or official who receives a FOIA request shall promptly forward it to the FOIA Officer, at the above address. Any Board employee or official who receives an oral request made under the FOIA shall inform the person making the request of the provisions of this subpart requiring a written request according to the procedures set out herein.

(c) Each request must reasonably describe the record(s) sought, including, when known: Entity/individual originating the record, date, subject matter, type of document, location, and

any other pertinent information which would assist in promptly locating the record(s).

(d) When a request is not considered reasonably descriptive, or requires the production of voluminous records, or places an extraordinary burden on the Board, seriously interfering with its normal functioning to the detriment of the business of the Government, the Board may require the person or agent making the FOIA request to confer with a Board representative in order to attempt to verify, and, if possible, narrow the scope of the request.

(e) Upon initial receipt of the FOIA request, the FOIA officer will determine which official or officials within the Board shall have the primary responsibility for collecting and reviewing the requested information and drafting a proposed response.

#### **§ 1631.7 Initial determination.**

The FOIA Officer or his or her designee shall have the authority to approve or deny requests received pursuant to these regulations. The decision of the FOIA Officer shall be final, subject only to administrative review as provided in § 1631.10.

#### **§ 1631.8 Prompt response.**

(a) The FOIA Officer or his or her designee shall either approve or deny a request for records within 10 working days after receipt of the request unless additional time is required for one of the following reasons:

(1) It is necessary to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(2) It is necessary to consult with another agency having a substantial interest in the determination of the request or to consult with two or more components of the Board having substantial subject matter interest therein.

(b) When additional time is required for one of the reasons stated in paragraph (a) of this section, the FOIA Officer or his or her designee shall acknowledge receipt of the request within the 10 workday period and include a brief explanation of the reason for the delay, indicating the date by which a determination will be forthcoming. An extended deadline adopted for one of the reasons set forth above may not exceed 10 additional workdays.

#### **§ 1631.9 Responses—form and content.**

(a) When a requested record has been identified and is available, the FOIA Officer or his or her designee shall

notify the person making the request as to where and when the record is available for inspection or that copies will be made available. The notification shall also advise the person making the request of any fees assessed under § 1631.13 of this part.

(b) A denial or partial denial of a request of a record shall be in writing signed by the FOIA Officer or his or her designee and shall include:

(1) The name and title of the person making the determination;

(2) A reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record, and a brief explanation of how the exemption applies to the record withheld; or

(3) A statement that, after diligent effort, the requested records have not been found or have not been adequately examined during the time allowed by § 1631.8, and that the denial will be reconsidered as soon as the search or examination is complete; and

(4) A statement that the denial may be appealed to the General Counsel within 30 days of receipt of the denial or partial denial. If a requested record cannot be located from the information supplied, or is known to have been destroyed or otherwise disposed of, the person making the request shall be so notified.

#### **§ 1631.10 Appeals to the General Counsel from initial denials.**

(a) When the FOIA Officer or his or her designee has denied a request for records in whole or in part, the person making the request may, within 30 calendar days of its receipt, appeal the denial to the General Counsel. The appeal must be in writing, addressed to the General Counsel, Federal Retirement Thrift Investment Board, Ben Franklin Station, P.O. Box 511, Washington, DC 20044 and clearly labeled as a Freedom of Information Act Appeal.

(b) The General Counsel will act upon the appeal within 20 workdays of its receipt. The General Counsel may extend the 20 day period of time by any number of workdays which could have been claimed and consumed by the FOIA Officer or his or her designee under § 1631.8 but which were not claimed and consumed in making the initial determination. The Board's action on any appeal shall be in writing, signed by the General Counsel.

(c) If the decision is in favor of the person making the request, the General Counsel shall order records promptly made available to the person making the request.

(d) A denial in whole or in part of a request on appeal shall set forth the exemption relied on and a brief

explanation of how the exemption applied to the records withheld and the reasons for asserting it, if different from that described by the FOIA Officer or his or her designee under § 1631.9. The denial shall state that the person making the request may, if dissatisfied with the decision on appeal, file a civil action in the district in which the person resides or has his principal place of business, in the district where the records are located, or in the District of Columbia.

(e) No personal appearance, oral argument or hearing will ordinarily be permitted in connection with an appeal to the Board.

(f) On appeal, the General Counsel may reduce any fees previously assessed.

#### **§ 1631.11 Fees to be charged—categories of requesters.**

(a) There are four categories of FOIA requesters: Commercial use requesters; representatives of news media; educational and noncommercial scientific institutions; and all other requesters. The time limits for processing requests shall only begin upon receipt of a proper request which reasonably identifies records being sought and which identifies the specific category of the requester. The Freedom of Information Reform Act of 1986 prescribes specific levels of fees for each of these categories:

(1) When records are being requested for commercial use, the fee policy of the Board is to levy full allowable direct cost of searching for, reviewing for release, and duplicating the records sought. Commercial users are not entitled to two hours of free search time, nor 100 free pages of reproduction of documents, nor waiver or reduction of fees, based on an assertion that disclosure would be in the public interest. The full allowable direct cost of searching for, and reviewing, records will be charged even if there is ultimately no disclosure of records. Commercial use is defined as a use that furthers the commercial trade or profit interests of the requester or person on whose behalf the request is made. In determining whether a requester falls within the commercial use category, the Board will look to the use to which a requester will put the documents requested. Where a requester does not explain his/her purpose, or where his/her purpose is insufficient, the Board shall require the requester to provide information regarding the use to be made of the information prior to accepting the request for processing. The time limits for processing and

response shall not begin until such information is adequately received.

(2) When records are being requested by representatives of the news media, the fee policy of the Board is to levy reproduction charges only, excluding charges for the first 100 pages.

Representatives of the news media refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances where they can qualify as disseminators of news) who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. As traditional methods of news delivery evolve (e.g. electronic dissemination of newspapers through telecommunications services) such alternative media would be included in this category. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but the Board may also look to the past publication record of a requester in making this determination. To be eligible for inclusion in this category, a requester must meet the criteria specified in this section and his or her request must not be made for a commercial use basis as that term is defined under paragraph (a)(1) of this section.

(3) When records are being requested by an educational or noncommercial scientific institution whose purpose is scholarly or scientific research, the fee policy of the Board is to levy reproduction charges only, excluding charges for the first 100 pages. The term "educational institution" refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education and an institution of vocational education, which operates a program or programs of scholarly research. The term "noncommercial scientific institution" refers to an institution that is not operated on a commercial basis as that term is defined under paragraph (a)(1) of this section and which is operated solely for the

purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. To be eligible for inclusion in this category, a requester must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a noncommercial scientific institution) research.

(4) For any other request which does not meet the criteria contained in paragraphs (a)(1) through (3) of this section, the fee policy of the Board is to levy full reasonable direct cost of searching for and duplicating the records sought, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge. The first two hours of computer search time is based on the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of the computer search, including the operator time and the cost of operating the computer to process the request, equals the equivalent dollar amount of two hours of the salary of the person performing the search, i.e., the operator, the Board shall begin assessing charges for computer search. Requests from individuals requesting records about themselves filed in the Board's systems of records shall continue to be treated under the provisions of the Privacy Act of 1974, which permit fees only for reproduction.

(b) Except for requests that are for a commercial use, the Board may not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requestor may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Board believes that a requester or, on rare occasions, a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the Board may aggregate any such requests and charge accordingly. For example, it would be reasonable to presume that multiple requests of this type made within a 30-day period had been made to avoid fees. For requests made over a longer period, however, the Board must have a solid basis for determining that aggregation is warranted in such cases. Before aggregating requests from more than one requester, the Board must have a

concrete basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. In no case may the Board aggregate multiple requests on unrelated subjects from one requester.

(c) In accordance with the prohibition of section (4)(A)(iv) of the Freedom of Information Act, as amended, the Board shall not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself.

(1) For commercial use requesters, if the direct cost of searching for, reviewing for release, and duplicating the records sought would not exceed \$30.00, the Board shall not charge the requester any costs.

(2) For requests from representatives of news media or educational and noncommercial scientific institutions, excluding the first 100 pages which are provided at no charge, if the duplication cost would not exceed \$30.00, the Board shall not charge the requester any costs.

(3) For all other requests not falling within the category of commercial use requests, representatives of news media, or educational and noncommercial scientific institutions, if the direct cost of searching for and duplicating the records sought, excluding the first two hours of search time and first 100 pages which are free of charge, would not exceed \$30.00, the Board shall not charge the requester any costs.

#### § 1631.12 Waiver or reduction of fees.

(a) The Board may waive all fees or levy a reduced fee when disclosure of the information requested is deemed to be in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Federal Government and is not primarily in the commercial interest of the requester.

(b) A fee waiver request shall indicate how the information will be used, to whom it will be provided, whether the requester intends to use the information for resale at a fee above actual cost, any personal or commercial benefits that the requester reasonably expects to receive by the disclosure, provide justification to support how release would benefit the general public, the requester's and/or intended user's identity and qualifications, expertise in the subject area and ability and intention to disseminate the information to the public.

#### § 1631.13 Prepayment of fees over \$250.

(a) When the Board estimates or determines that allowable charges that a requester may be required to pay are

likely to exceed \$250.00, the Board may require a requester to make an advance payment of the entire fee before continuing to process the request.

(b) When a requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 days of the date of the billing, the Board may require the requester to pay the full amount owed plus any applicable interest as provided in § 1631.14(d), and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester.

(c) When the Board acts under paragraph (a) or (b) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., 10 working days from the receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extensions of these time limits) will begin only after the Board has received fee payments under paragraph (a) or (b) of this section.

#### § 1631.14 Fee schedule.

(a) *Manual Searches for Records.* The Board will charge at the salary rate(s) (basic pay plus 16 percent) of the employee(s) conducting the search. The Board may assess charges for time spent searching, even if the Board fails to locate the records or if records located are determined to be exempt from disclosure. The Board may assess charges for time spent searching, even if the Board fails to locate the records or if records located are determined to be exempt from disclosure.

(b) *Computer Searches for Records.* The Board will charge the actual direct cost of providing the service. This will include the cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary apportionable to the search. The Board may assess charges for time spent searching, even if the Board fails to locate the records or if records located are determined to be exempt from disclosure.

(c) *Duplication Costs.* (1) For copies of documents reproduced on a standard office copying machine in sizes up to 8½ x 14 inches, the charge will be \$.15 per page.

(2) The fee for reproducing copies of records over 8½ x 14 inches, or whose physical characteristics do not permit reproduction by routine electrostatic copying, shall be the direct cost of reproducing the records through Government or commercial sources. If the Board estimates that the allowable

duplication charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester had indicated in advance his/her willingness to pay fees as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the objective of reformulating the request to meet his/her needs at a lower cost.

(3) For copies prepared by computer, such as tapes or printouts, the Board shall charge the actual cost, including operator time, of production of the tape or printout. If the Board estimates that the allowable duplication charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his/her willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the objective of reformulating the request to meet his/her needs at a lower cost.

(4) For other methods of reproduction or duplication, the Board shall charge the actual direct costs of producing the document(s). If the Board estimates that the allowable duplication charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his/her willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the objective of reformulating the request to meet his/her needs at a lower cost.

(d) Interest may be charged to those requesters who fail to pay fees charged. The Board may begin assessing interest charges on the amount billed starting on the 31st day following the day on which the billing was sent. Interest will be at the rate prescribed in section 3717 of Title 31 of the United States Code, and it will accrue from the date of the billing.

(e) The Board shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA. The Board may choose to contract with private sector services to locate, reproduce and disseminate records in response to FOIA requests when that is the most efficient and least costly method. When documents responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs, such as, but not limited to, the Government Printing Office or the National Technical Information Service, the Board will inform requesters of the steps necessary to obtain records from those sources.

#### § 1631.15 Information to be disclosed.

(a) In general, all records of the Board are available to the public, as required by the Freedom of Information Act. However, the Board claims the right, where it is applicable, to withhold material under the provisions specified in the Freedom of Information Act as amended (5 U.S.C. 552(b)).

(b) *Records from Non-U.S. Government Source.* (1) Upon receipt of a request for a record that was obtained from a non-U.S. Government source, or for a record containing information clearly identified as having been provided by a non-U.S. Government source, including a contract proposal or contract material, the Board will contact the source of the requested record or information requesting advice as to whether the release of the record would adversely affect the source's competitive position or invade anyone's privacy. Subsequent to receipt of such advice, the Board will independently examine the requested document and will notify the requester of the final decision.

(2) Board personnel will generally consider two exemptions in the FOIA in deciding whether to withhold from disclosure material from a non-U.S. Government source. Exemption 4 permits withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Exemption 6 permits withholding certain information, the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." The source whose material has been requested will be asked to supply convincing justification for any material it wishes withheld under the Act, in accordance with the following general guidelines.

(i) For consideration under exemption 4, the supplier of the record or information should identify material that would be likely to cause substantial harm to its present or future competitive position if it were released. If a contractor, the provider should assume that the material will be released to a competitor, even if that is not always the case. A contractor must provide detailed information on why release would be harmful, e.g., the general custom or usage in the business; the number and situation of the persons who have access to the information; the type and degree of risk of financial injury that release would cause; and the length of time the information will need to be kept confidential.

(A) In this respect, the Board will, as a general rule, look favorably upon recommendations for withholding information about ideas, methods, and

processes that are unique; about equipment, materials, or systems that are potentially patentable; or about a unique use of equipment which is specifically outlined.

(B) The Board will not withhold information that is known through custom or usage in the relevant trade, business, or profession, or information that is generally known to any reasonably educated person. Self-evident statements or reviews of the general state of the art will not ordinarily be withheld.

(C) The Board will withhold all cost data submitted except the total estimated costs from each year of the contract. It will release these total estimated costs and ordinarily release explanatory material and headings associated with the cost data, withholding only the figure themselves. If a contractor believes some of the explanatory material should be withheld, that material must be identified and a justification be presented as to why it should not be released.

(ii) Exemption 6 is not a blanket exemption for all personal information. The Board will balance the need to keep a person's private affairs from unnecessary public scrutiny with protection to the public's right to information on Government records.

(A) As a general practice, the Board will release information about any person named in a contract itself or about any person who signed a contract as well as information given in a proposal about any officer of a corporation submitting that proposal. Except for names and other identifying details, the Board usually releases all information in resumes concerning employees, including education and experience. Efforts will be made to identify information that should be deleted and offerors are urged to point out such material for guidance. Any information in the proposal which might constitute an unwarranted invasion of personal privacy if released should be identified and a justification for non-release provided in order to receive proper identification.

(B) The Board can protect the names of, and identifying details about, other staff members who are described in a contract proposal if it is clear that identification of these employees would assist competitors in raiding and hiring them away. In this regard, names and other identifying details could be protected under Exemption 4 (harmful to competitive position) and also under Exemption 6 (it would be an unwarranted invasion of personal privacy to release them). In such a case,

the Board would withhold names, home addresses, salaries, telephone numbers, social security numbers, marital status and, if these served to identify them, perhaps some details about past employment or professional activities of these persons.

#### **§ 1631.16 Exemptions.**

(a) 5 U.S.C. 522 exempts from all of its publication and disclosure requirements nine categories of records which are described in 552(b). These categories include such matters as national defense and foreign policy information, investigatory files, internal procedures and communications, materials exempted from disclosure by other statutes, information given in confidence and matters involving personal privacy.

(b) The records of the Board which are part of a system of records subject to the Privacy Act of 1974 are exempt from disclosure to the public except as provided by 5 CFR Part 1610.

#### **§ 1631.17 Deletion of exempted information.**

Where material records contain matters which are exempted under 5 U.S.C. 552(b) but which matters are reasonably segregable from the remainder of the records, they shall be disclosed by the Board with deletions. To each such record, the Board shall attach a written justification for making deletions. A single such justification shall suffice for deletions made in a group of similar or related records.

#### **§ 1631.18 Annual report.**

The Freedom of Information Officer shall annually on or before March 1, submit a Freedom of Information report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate. The report shall include those matters required by 5 U.S.C. 552(d).

### **Subpart B—Production in Response or Subpoenas or Demands of Courts or Other Authorities**

#### **§ 1631.30 Purpose and scope.**

This subpart contains the regulations of the Board concerning procedures to be followed when a subpoena, order, or other demand (hereinafter in this subpart referred to as a "demand") of a court or other authority is issued for the production or disclosure of:

(a) Any material contained in the files of the Board;

(b) Any information relating to materials contained in the files of the Board; or

(c) Any information or material acquired by an employee of the Board as a part of the performance of his or

her official duties or because of his or her official status.

#### **§ 1631.31 Production prohibited unless approved by the Executive Director.**

No employee or former employee of the Board shall, in response to a demand of a court or other authority, produce any material contained in the files of the Board or disclose any information or produce any material acquired as part of the performance of his or her official status without the prior approval of the Executive Director or his or her designee.

#### **§ 1631.32 Procedure in the event of a demand for disclosure.**

(a) Whenever a demand is made upon an employee or former employee of the Board for the production of material or the disclosure of information described in § 1631.31, he or she shall immediately notify the Executive Director or his or her designee. If possible, the Executive Director or his or her designee shall be notified before the employee or former employee concerned replies to or appears before the court or other authority.

(b) If response to the demand is required before instructions from the Executive Director or his or her designee are received, an attorney designated for that purpose by the Board shall appear with the employee or former employee upon whom the demand has been made, and shall furnish the court or other authority with a copy of the regulations contained in this part and inform the court or other authority that the demand has been or is being, as the case may be, referred for prompt consideration by the Executive Director or his or her designee. The court or other authority shall be requested respectfully to stay the demand pending receipt of the requested instructions from the Executive Director.

#### **§ 1631.33 Procedure in the event of an adverse ruling.**

If the court or other authority declines to stay the effect of the demand in response to an request made in accordance with § 1631.32(b) pending receipt of instructions from the Executive Director, or his or her designee, or if the court or other authority rules that the demand must be complied with irrespective of the instructions from the Executive Director not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand.

(United States ex. rel. Touhy v. Ragen, 340 U.S. 462 (1951)).

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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Parts 250 and 251

#### Donation of Foods for Use in the United States, Its Territories and Possessions and Areas Under Its Jurisdiction; Temporary Emergency Food Assistance Program for FY 1986 and 1987

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the regulations governing the Temporary Emergency Food Assistance Program (7 CFR Part 251). This amendment will implement the discretionary provisions of Pub. L. 99-198 related to the transfer of section 32 commodities among eligible recipient agencies, the standards for commodity loss liability, and the procedures for determining each State's contribution toward meeting the required match of a portion of the Federal funds received under this program. Several technical revisions are also made to this part and to 7 CFR Part 250, Donation of Foods for Use in the United States, its Territories and Possessions and Areas under its Jurisdiction.

**EFFECTIVE DATE:** Provisions implementing the matching requirements contained in § 251.9 are effective October 1, 1987. All other provisions are effective April 1, 1987.

**FOR FURTHER INFORMATION CONTACT:** Susan Proden, Chief, Program Administration Branch, Food Distribution Division, Food and Nutrition Service, Park Office Center, Alexandria, Virginia 22302, Telephone (703) 756-3660.

#### SUPPLEMENTARY INFORMATION:

##### Classification

This action has been reviewed under Executive Order 12291 and has not been classified major because it does not meet any of the three criteria identified under the Executive Order. Compliance with the provisions in this rule will not have an annual effect on the economy of more than \$100 million or more, nor will it cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic

regions. This action will not have significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States based enterprises to compete with foreign based enterprises in domestic or export markets.

This action has been reviewed with regard to the Regulatory Flexibility Act (5 U.S.C. 601-612). S. Anna Kondratas, Acting Administrator of the Food and Nutrition Service (FNS), has certified that this action will not have a significant economic impact on a substantial number of small entities.

The effective dates of this rule are all set by statute. Section 1569(a) of Pub. L. 99-198 requires the matching requirements in § 251.9 of this rule to be effective October 1, 1987. The remaining provisions are subject to Section 1583 of Pub. L. 99-198 which mandates that the regulations implementing Title XV of Pub. L. 99-198 be issued no later than April 1, 1987. Since these provisions are necessary to implement Title XV Pub. L. 99-198, the rule (with the exception of the matching requirements) must be made effective not later than April 1, 1987. Thus, making all of the provisions except the matching requirements effective at least 30 days after publication is not required under 5 U.S.C. 553(d).

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 through 3520), additional recordkeeping and reporting requirements contained in §§ 250.4(a), 251.4(a), 251.4(j), 251.9(e), and 251.9(f) of this final rule are subject to review and approval by the Office of Management and Budget (OMB). Current reporting and recordkeeping requirements for Part 251 were approved by OMB under Control Number 0584-0313 and 0584-0341.

This program is listed in the Catalog of Federal Domestic Assistance under 10.568 and is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. (7 CFR Part 3015, Subpart V and the final rule related notice published at 49 FR 22675, May 31, 1984).

##### Legislative Background

Title II, of Pub. L. 98-8 was designated as the Temporary Emergency Food Assistance Act of 1983 (7 U.S.C. 612c note), hereafter referred to as the "Act". It authorized the distribution of surplus agricultural commodities acquired through the Commodity Credit Corporation to various outlets for Fiscal Year 1983. It also authorized a \$50 million appropriation for the cost of storage and distribution of commodities

in that fiscal year. At least 20 percent of those funds was to be allocated by State agencies to emergency feeding organizations for costs incurred in providing commodities to needy households, including low-income and unemployed persons. The remaining funds could be used for States' storage and distribution costs.

The Act was subsequently amended, most recently by Pub. L. 99-198, the Food Security Act of 1985. Public Law 99-198 made a number of significant changes to the Act, foremost of which was the extension of the Temporary Emergency Food Assistance Program (TEFAP) through September 30, 1987.

##### Regulatory Background

Interim regulations governing the TEFAP were published on December 16, 1983, (48 FR 55988-55993). The Department published proposed amendments to the interim rule on July 2, 1984, (49 FR 27159-27160) which were designed to strengthen the accountability and monitoring requirements of Part 251. A 60-day comment period was provided for the interim as well as for the proposed rule.

In order to finalize the provisions of both the interim and proposed rule and implement the nondiscretionary provisions of Pub. L. 99-198, the Department published a final rule on April 16, 1986, (51 FR 12819). The final rule set forth the TEFAP regulations in their entirety.

A proposed rule to address the discretionary provisions of Pub. L. 99-198 was published on July 15, 1986 (51 FR 25534-25539). Specifically, the proposed rule outlined procedures for effecting section 32 transfers among recipient agencies, dealing with commodity losses incurred by emergency feeding organizations, determining the amount of funding to be provided to emergency feeding organizations and identifying and monitoring a State's contribution toward the newly required match of a portion of Federal funds received.

##### Analysis of Comments

Thirty days were afforded the general public for comment on the July 15, 1986, proposed rule. A total of 53 comment letters was received. Comment letters were received from various sources such as State agencies, emergency feeding organizations, members of Congress and public interest groups.

##### Transfer of Section 32 Commodities

Section 1564(a) of Pub. L. 99-198 authorized the Secretary to use donated commodities made available under

section 32 of Pub. L. 74-320 (7 U.S.C. 612c) in the TEFAP. In addition, section 1561 of Pub. L. 99-198 amended section 32 to allow a public or private nonprofit organization that receives agricultural commodities under section 32 to transfer those commodities to another public or private nonprofit organization that agrees to use such commodities to provide, without cost or waste, nutrition assistance to individuals in low-income groups.

The proposed rule added a new paragraph (g) to § 251.4 which would allow emergency feeding organizations to transfer section 32 commodities to other emergency feeding organizations or to recipient agencies governed by 7 CFR Part 250. Consistent with provisions for commodity transfers among recipient agencies Part 250, such transfers could not be made without prior approval of the applicable State and/or distributing agency. In recognition of the fact that emergency feeding organizations are governed under Part 251 and recipient agencies are governed under Part 250, the proposed rule required that transfers between emergency feeding organizations and recipient agencies be documented on the form FNS-155, Receipt and Distribution of Donated Commodities. Corresponding changes were made to Part 250 to allow recipient agencies to transfer section 32 commodities to emergency feeding organizations under Part 251. As under Part 251, such transfers could not be effected without State/distributing agency approval. Further, cross-program transfers would have to be documented on the form FNS-155.

The proposed rule also moved the prohibition on the sale or other disposal of commodities in commercial channels from § 251.9 to proposed paragraph (g).

Thirteen comments were received concerning the transfer of section 32 commodities. Three of the commenters expressed concern about documenting cross program transfers of section 32 commodities on the form FNS-155 report since the current form does not lend itself to reporting donated foods in the possession of individual recipient agencies. Two commenters expressed concern relative to whether or not the distributing agency has final approval authority for the transfer of section 32 commodities which have been provided as a part of a State's authorized level of assistance since this is inconsistent with the proposed revision to the Food Distribution Program Regulations, Part 250.

While transfers of section 32 commodities could be documented and submitted as an attachment to the form FNS-155, upon reconsideration the

Department has determined that documentation of transfers in any manner that provides an audit trail is sufficient. Thus, § 251.4(g) of this final rule has been revised to require that the transfer of section 32 commodities between emergency feeding organizations and recipient agencies must be documented by the State/distributing agency and the documentation maintained in accordance with the recordkeeping requirements in § 251.10(a) and 250.6(r). Documentation of transfers will be subject to review during the management evaluation review. Corresponding changes have also been made to § 250.4.

The Department did not intend for the transfer procedures effectuating transfers under Part 251 to be inconsistent with the proposed Part 250 provisions. When the proposed change to Part 250 is made final, corresponding changes will be made to Part 251 if necessary.

Two commenters recommended that the rule clarify what commodities can be transferred from recipient agencies to emergency feeding organizations. Pub. L. 99-198 and the proposed rule limit the transfer of donated foods between emergency feeding organizations and recipient agencies to those which have been made available under section 32 of Pub. L. 74-320. The types of commodities made available under section 32 include meat, poultry, vegetables and fruits. The availability of section 32 commodities will vary depending on market conditions. In the event the distributing agency or TEFAP State agency is unable to determine if a particular food item was made available under section 32, the FNS Regional Office should be contacted for verification.

A few commenters raised concerns that such transfers could cause displacement of commercial food purchases and that the amounts which will be available for transfer will probably not be sufficient for a statewide distribution. The Department agrees that in most instances the amount of section 32 donated foods which will be available for transfer will not be sufficient for a statewide distribution to needy households and/or recipient agencies. However, the Department is confident that the distributing/State agencies will be able to provide for the equitable distribution of any section 32 commodities which become available for transfer. Furthermore, since the transfer of section 32 commodities is specifically authorized by Pub. L. 99-198, the Department does not have the discretionary authority to prohibit such

transfers. With regard to the possibility of such transfers resulting in displacement of commercial sales, distributing/State agencies are currently required by §§ 250.6(1) and 251.4(b) to ensure that the distribution of donated food under Parts 250 and 251 does not diminish the normal expenditures for food by recipients and recipient agencies. These provisions apply to the use of transferred section 32 commodities as well. In addition, the Department is of the opinion that the quantities which will be made available by recipient agencies for transfer to emergency feeding organizations will not be significant enough to have a significant impact on commercial sales.

As stated in the proposed rule, the Department strongly encourages State and distributing agencies to consider factors such as the packaging size of the donated foods to be transferred and the transferee's method of distribution in an effort to avoid situations which pose potential health hazards.

One commenter asked if emergency feeding organizations can submit a claim for reimbursement for costs associated with the distribution of section 32 donated foods. Reimbursements for the costs of storage and distribution are allowable in accordance with § 251.8(d).

#### Standards for Commodity Losses Liability

Section 1570 of Pub. L. 99-198 requires the Secretary to "set standards with respect to liability for commodity losses \* \* \* in situations in which there is no evidence of negligence or fraud, and conditions for payment to cover such losses". Further, the law requires that the special needs and circumstances of emergency feeding organizations be taken into consideration.

In order to implement this provision, a new paragraph (j) was added to § 251.4 of the proposed rule. Paragraph (j) outlined USDA policies for recovering commodity losses, taking into consideration the special needs and circumstances of emergency feeding organizations where no evidence of fraud or negligence exists.

Twenty-eight comment letters were received. Sixteen commenters opposed the provisions as outlined in paragraph (j) for various reasons. Five of the commenters oppose the claim provisions on the basis that emergency feeding organizations are supported through volunteer efforts and thus should not be held liable for losses. Three commenters recommended that a threshold, such as five percent, be established below which no claims action will be required.

In requiring that the special needs and circumstances of emergency feeding organizations must be taken into account, the statute did not provide that all claims of these organizations should be disregarded. In fact, the law provided that a limit on loss liability be set only when there is no evidence of fraud or negligence.

It is the opinion of the Department that the provisions contained in paragraph (j) of the proposed rule provide sufficient State agency discretion while ensuring that the integrity of the program is maintained. Therefore, the final rule retains the proposed requirement that in making final claim determinations for commodity losses incurred when there is no evidence of fraud or negligence, State agencies (and FNS Regional Offices when reviewing claim determinations) must consider the special needs and circumstances of the emergency feeding organization and make appropriate adjustments. With regard to the establishment of a threshold below which no claims action will be required, State agencies are not required to make claim determinations when the value of the lost commodities is \$100 or less, unless there is evidence of fraud or a violation of Federal, State or local criminal law or when program operations would be adversely affected. However, in an effort to provide additional information on specific procedures for handling claims, paragraph (j) of the final rule has been revised to reference FNS Instruction 410-1, *Non Audit Claims—Food Distribution*. This instruction provides more specific information about claims collection and outlines the procedures which need to be followed in pursuing claims.

Paragraph (j) of the proposed rule also included clarification of an FNS policy relative to the use of funds derived from a claim due to the loss of foods. FNS policy requires that such funds be returned to the Department. One commenter objected to the requirement that funds derived from a claim due to the loss of TEFAP foods must be returned to the Department rather than being retained at the State or local level for replacement of the commodities or other program use. The Department believes that returning funds derived from claims to the Department is necessary to discourage improper use of commodities and to maintain program integrity. As discussed above, special needs of the EFOs will already have been taken into account in assessing a claim.

However, given the nature of this program, the Department may, in instances in which it has been determined by the Department that the collection of funds will have a significant adverse effect on the operation of the program, permit in-kind replacement of the foods in lieu of the requirement that payment be made to FNS. Repayment in kind can only be permitted under such terms and conditions as agreed to by the Secretary. Section 251.4(j) has been revised to incorporate the repayment in kind language.

#### Funding for Distribution of Commodities

In extending the Act through Fiscal Year 1987, Pub. L. 99-198 omitted a statutory requirement that funds given to emergency feeding organizations for payment of storage and distribution costs not exceed 5 percent of the value of commodities distributed by these organizations. This restriction was placed on all previous fiscal year's funding for section 204(b) of the Act. In discussing the deletion of the 5 percent restriction from Part 251 in the preamble of the final rule published on April 16, 1986, 51 FR 12819, the Department indicated that the issue would be further addressed in the proposed rulemaking. In § 251.8 of the proposed rule, the Department proposed to reestablish the 5 percent maximum.

Twenty seven comments were received concerning the 5 percent restriction. Twenty-five of the commenters opposed the provision. The majority of the commenters opposed the provision on the basis that: (1) States should have the flexibility to allocate funds based on their analysis of the activities of the emergency feeding organization; and (2) the 5 percent restriction will have an adverse effect on distribution in rural areas which is contradictory to the intent of the legislation.

While the Department agrees that States should have flexibility in allocating funds, the Department is also concerned that funds are allocated in a fair and equitable manner. In an effort to provide State agencies with flexibility, § 251.8 has been revised to eliminate the 5 percent restriction. However, to ensure that the State agency's allocation formula provides for the most effective use of the funds (e.g. funds are allocated based on the amount of food distributed), § 251.6 has been revised to require that State agencies describe the formula for allocating funds to emergency feeding organizations in the Distribution Plan submitted for approval by the FNS Regional Office. The Department plans to monitor States'

allocation methods. If it appears that State procedures do not provide the appropriate degree of equity, we will reconsider the use of a mandated distribution formula.

#### State Matching Requirements

Section 1569(a) of Pub. L. 99-198 requires each State to match, in cash or in-kind, each Federal dollar retained by the State and used solely for State-level activities. Funds retained by the State to pay for the direct expenses of local distribution are excluded from the matching requirements. While funds may be allocated to the State before the matching requirements are satisfied, FNS is required to adjust the funding allocation to correct for overpayments and underpayments.

Paragraph (a) of § 251.9 of the proposed rule required that effective January 1, 1987, States would have to provide in cash or in-kind, a contribution equal to the difference between (1) the amount of funds received under § 251.8 and (2) any part of the amount allocated to the State and paid by the State to emergency feeding organizations or for the storage and distribution costs of such organizations.

Paragraph (b) reflected the provision in Pub. L. 99-198 which allows those States in which the legislature does not convene in regular session before January 1, 1987 to delay implementation until October 1, 1987. The preamble of the proposed rule (51 FR 25536) emphasized that this meant the match requirements would not be effective until October 1, 1987, in those States in which the legislature does not convene in regular session during the period between the effective date of the final rule (which would establish the Secretary's standards for in-kind contributions as required by section 1569(a) of Pub. L. 99-198) and January 1, 1987. Another exception recognized the provisions of 48 U.S.C. 1469a(d) which exempts American Samoa, Guam, the Virgin Islands and the Northern Mariana Islands from matching requirements (including in-kind contributions) if their respective matching requirements are under \$200,000. To date American Samoa and Guam have not participated in TEFAP, however, the Department set forth the exception to prevent confusion if, at some later date, American Samoa or Guam should wish to participate.

In accordance with section 1569(a) of Pub. L. 99-198, paragraph (c) specified that a State's contribution toward the matching requirement would have to be through cash or in-kind contributions from non-Federal sources. In order for an in-kind contribution to be considered

toward the matching requirements, it must meet the requirements set forth in 7 CFR Part 3015, Subpart G.

Thirty-five comments were received concerning the State matching requirements contained in § 251.9 of the proposed rule. Twenty-five of the commenters requested clarification concerning what in-kind and cash contributions can be counted toward meeting the matching requirement. Ten commenters recommended that the requirement be deleted.

As stated above, Pub. L. 99-198 requires each State to match, in cash or in-kind, each Federal dollar retained by the State and used solely for State level activities. Since the requirement is mandated by legislation, the Department does not have the authority to waive the matching requirement. Thus, paragraph (a) of the proposed rule has been retained in this final rule.

A few comments were received concerning the October 1, 1987, implementation date of the matching requirements for those States in which the legislature does not convene in regular session during the period between the effective date of the final rule and January 1, 1987. Since this rule is being published after January 1, the effective date of the matching requirements is October 1, 1987 for all States. Thus, § 251.9(b) of the final rule has been revised to eliminate the language relative to implementation dates. The October 1, 1987 implementation date for matching requirements is now contained at the beginning of § 251.9(a) and under the "Effective Dates" Section of this rule.

As pointed out by the commenters, the TEFAP legislative authority will expire on September 30, 1987. Even though the legislative authority for program operations will expire prior to the October 1, 1987, effective date, the Department encourages State to take the necessary action to implement the matching requirements since the Congress may extend the program.

With regard to what cash and in-kind contributions can be counted toward meeting the matching requirement, paragraph (c) of § 251.9 of the final rule has been revised to: (1) Include language which identifies allowable "cash contributions" as any cash outlay of the State agency specifically identifiable as State-level storage and distribution costs, including the outlay of money contributed to the State agency by other public agencies and institutions, and private organizations and individuals. Examples of cash contributions have also been included. Such examples include, but are not limited to, the purchase of office supplies, storage

space, transportation, loading facilities and equipment, employees' salaries, and other goods and services for which there has been a cash outlay by the State agency; and (2) include language which identifies "in-kind contributions" as charges, which are non-cash outlays, for real property and non-expendable personal property and the value of goods and services specifically identifiable with State-level storage and distribution costs. Examples of in-kind contributions have also been added. Such examples may include, but are not limited to, the donation of office supplies, storage space, vehicles to transport the commodities, loading facilities and equipment such as pallets and forklifts, and other non-cash goods and services provided by the State agency. In accordance with 7 CFR 3015.52(a), the matching requirement shall not be met by costs supported by another Federal grant, except as provided by Federal statute.

These final regulations also clarify the extent to which EFO and/or other third party activities and expenditures count toward meeting the matching requirements. Cash donations by non-federal third parties and the value of third party in-kind goods and services are expressly permitted by 7 CFR 3015.51. The Department did not intend to modify this provision in these regulations.

However, the Department wishes to provide further clarification on the permissible source of contributions in the context of the TEFAP. 7 CFR 3015.51 limits matching contributions to allowable costs. In the case of the TEFAP, the only portion of the grant which must be matched is the amount of the grant retained at the State level and used for State-level storage and distribution costs. Therefore, the costs incurred by EFOs for local-level distribution and the value of volunteer services at the EFO level are not allowable costs with respect to this portion of the grant, and cannot be used to meet the matching requirement. On the other hand, if an EFO or other third party makes a cash or in-kind contribution to the State agency which is used by the State agency for State-level storage and distribution costs, the contribution may be used to meet the match. For example, should an EFO offer the services of one of its employees to assist the State in its administration of the program, the employee's salary, for the period of time that the employee is working for the State, even though paid by the EFO, can be counted toward meeting the matching requirement.

Section 251.9(e) requires that the estimated amount of Federal funds to be

retained at the State level for State level activities, the estimated dollar value of the State's contribution, and, if applicable, a description and valuation of in-kind contributions to be applied to the State's required match be identified in the State's Distribution Plan. Therefore, State-level activities for which State, EFO or other third party contributions may count toward meeting the match requirement will have already been identified in the State's Distribution Plan.

In addition, to permit States to count the value of services and expenditures for local-level storage and distribution to meet the matching requirement is contrary to the legislation. The statute expressly prohibits the States from passing on the cost of the matching requirement to any emergency feeding organization and requires the States to contribute the matching amount. Section 251.9(c) of the final rule has been issued to reinforce this application of 7 CFR 3015.51 to the TEFAP matching requirements.

The Department wishes to draw attention to the regulations concerning valuation of in-kind contributions found at 7 CFR 3015.53 through 3015.56. In general, the value of donated property is the fair market value or the cost of the property to the supplier, whichever is less.

Section 251.9(a) has also been revised to clarify that those funds which are retained by the State to pay for the direct storage and distribution costs of emergency feeding organizations are excluded from the matching requirement.

As required by section 1569(c) of Pub. L. 99-198, Paragraph (c) of § 251.9 of the proposed rule also prohibited State agencies from passing on the cost of the matching requirement to emergency feeding organizations. However, the proposed rule permitted the State to assess charges equal to its direct costs of storing and transporting the commodities less any amount the Secretary provides to the State for this purpose as specifically permitted in section 208 of the Act and 7 CFR 250.6(j)(2). The proposed rule did prohibit the State from counting the assessment fees toward the matching requirement.

Twenty-one comments were received concerning this provision. Twenty of the commenters objected to State agencies being permitted to assess charges against emergency feeding organizations for reasons such as: (1) It was the intent of Congress in section 1569(c)(5) of Pub. L. 99-198 to prohibit such charges; and

(2) it is not possible for EFO's to pay such fees.

Section 208 of the 1983 Temporary Emergency Food Assistance Act authorizes State agencies to assess charges to cover costs incurred by the States. However, section 1569 of the 1985 Act prohibits State agencies from assessing any fees. After reevaluating the legislation, including the statutory prohibition against charging for commodities, and reviewing comments on this provision, paragraph (d) of § 251.9 of the final rule has been revised to prohibit State agencies from assessing any charges for foods made available under TEFAP.

Paragraphs (d) and (e) of § 251.9 of the proposed rule outlined the Department's proposed implementation of the matching requirement. Under paragraph (d), the Department proposed to require State agencies to submit, as part of the Distribution Plan currently required in § 251.6 a plan, for FNS approval, which identifies the estimated amount of Federal funds to be retained at the State level for State level activities, the estimated dollar value of the State's contribution and, if applicable, a description and valuation of the in-kind contribution to be applied to the State's required match. The proposed rule also amended § 251.6 of the current TEFAP regulations to reflect these additional requirements. Submission of the expanded distribution plan would continue to be required no later than October 1 of each fiscal year. Paragraph (e) of the proposed rule required State agencies to identify the State's contribution toward the matching requirements on the SF-269, Financial Status Report.

Three comments were received concerning submission of the TEFAP Distribution Plan. Two commenters supported the provisions contained in paragraph (d) of the proposed rule. One commenter expressed concern about the October 1 date for submission since it does not appear that it will coincide with the effective date of the final rule. Submission of a revised Distribution Plan is no longer an issue since the matching requirements will not be effective until October 1, 1987.

With regard to paragraph (e) of the proposed rule, one commenter expressed concern about how in-kind contributions are to be reported on the SF-269, Financial Status Report. Guidance material for use in preparing the SF-269 report is being developed and will be provided to all State agencies.

Section 251.9(f) of the proposed rule provided that a State's failure to meet the required match would result in the

suspension or disallowance of the appropriate portion of the States' allocation. The Department received no comments concerning the provisions contained in paragraph (f) of the proposed rule. This paragraph is being adopted as proposed as paragraph (g) of § 251.9 in the final rule.

#### Agreements

In an effort to clarify § 251.2(c) with regard to the frequency of written agreements, the proposed rule specifically required State agencies to enter into written agreements with EFO's which receive Federal funds of not more than one year's duration and which expire by September 30 of each year.

Six comments were received concerning the annual written agreement provision. Three of the commenters expressed concern relative to the agreement period. The commenters recommended that the agreement period should be determined by the State agency. As mentioned in the preamble of the proposed rule, until funds are appropriated to the Department, the Department is without authority to obligate funds to State agencies, and through the State agencies to the EFO's. Therefore, it is necessary to require State agencies to enter into agreements with EFO's which coincide with the Federal fiscal year. However, in an effort to limit the administrative burden on the State agencies and EFO's, § 251.2(c) of the final rule has been revised to permit State agencies to make up to two one-year renewals of EFO agreements.

All initial agreements and renewals must still be limited to one Federal fiscal year. At the time of renewal, instead of completing the entire initial application process, the EFO may limit its submission to any information which has changed from the initial application and updated caseload information. The renewals are limited to two so as to ensure that the State agency has current information on these EFO's. These restrictions on agreements and renewals apply only to EFO's which receive Federal funds.

#### List of Subjects

##### 7 CFR Part 250

Aged, Agricultural commodities, Business and industry, Food assistance programs, Food donations, Food processing, Grant programs-social programs, Infants and children, Price support programs, Reporting and recordkeeping requirements, School breakfast and lunch programs, Surplus agricultural commodities.

##### 7 CFR Part 251

Aged, Agricultural commodities, Business and industry, Food assistance programs, Food donations, Grant programs-social programs, Indians, Infants and children, Price support programs, Reporting and recordkeeping requirements, School breakfast and lunch programs, Surplus agricultural commodities.

Accordingly, 7 CFR Part 250 and 7 CFR Part 251 are amended as follows:

#### PART 250—DONATIONS OF FOOD FOR USE IN THE UNITED STATES, ITS TERRITORIES AND POSSESSIONS AND AREAS UNDER ITS JURISDICTION

1. The authority citation for Part 250 is revised to read as follows:

**Authority:** Sec. 32, Pub. L. 74-320, 49 Stat. 744 (7 U.S.C. 612c); Pub. L. 75-165, 50 Stat. 233 (15 U.S.C. 713c); secs. 6, 9, 60 Stat. 231, 233, Pub. L. 79-396 (42 U.S.C. 1755, 1758); sec. 416, Pub. L. 81-439, 63 Stat. 1058 (7 U.S.C. 1431); sec. 402, Pub. L. 91-665, 68 Stat. 843 (22 U.S.C. 1922); sec. 210, Pub. L. 84-540, 70 Stat. 202 (7 U.S.C. 1859); sec. 9, Pub. L. 985-931, 72 Stat. 1792 (7 U.S.C. 1431b); Pub. L. 86-756, 74 Stat. 899 (7 U.S.C. 1431 nt); sec. 709, Pub. L. 89-321, 79 Stat. 1212 (7 U.S.C. 1446a-1); sec. 3, Pub. L. 90-302, 82 Stat. 117 (42 U.S.C. 1761); secs. 409, 410, Pub. L. 93-288, 88 Stat. 157 (42 U.S.C. 5179, 5180); sec. 2, Pub. L. 93-326, 88 Stat. 286 (42 U.S.C. 1762a); sec. 16, Pub. L. 94-105, 89 Stat. 522 (42 U.S.C. 1766); sec. 1304a, Pub. L. 95-113, 91 Stat. 980 (7 U.S.C. 612c nt); sec. 311, Pub. L. 95-478, 92 Stat. 1533 (42 U.S.C. 3030a); sec. 10, Pub. L. 95-627, 92 Stat. 3623 (42 U.S.C. 1760); sec. 1561, Pub. L. 99-198, 99 Stat. 1589 (7 U.S.C. 612c); 5, U.S.C. 301, unless otherwise noted.

2. Section 250.4 paragraph (a) is revised to read as follows:

##### § 250.4 Availability of donated foods.

(a) *Distribution and use of donated foods.* Commodities shall be available only for distribution and use in accordance with the provisions of this part, and with respect to distribution to households on or near an Indian reservation, of Part 253 of this chapter. Donated foods not so distributed or used (for any reasons) shall not be sold, exchanged or otherwise disposed of without the approval of the Department. However, donated foods may be transferred between recipient agencies with the authorization of the distributing agency if determined to be in the best interest of the distribution program. Food donated under section 32 of Pub. L. 74-320 (7 U.S.C. 612c) may also be transferred by recipient agencies to emergency feeding organizations which are distributing donated foods under 7 CFR Part 251. A transfer between recipient agencies and emergency

feeding organizations may be made only with the prior approval of the distributing agency and the State agency responsible for administering TEFAP. Transfers of donated foods between emergency feeding organizations and recipient agencies shall be documented. Such documentation shall be maintained in accordance with §§ 250.6(r) and 251.10(a) by the distributing agency and the State agency responsible for administering TEFAP and made available for review upon request.

#### PART 251—TEMPORARY EMERGENCY FOOD ASSISTANCE PROGRAM FOR FISCAL YEARS 1986 AND 1987

1. The authority citation for Part 251 continues to read as follows:

Authority: Pub. L. 98-8, as amended; 7 U.S.C. 612c note.

2. Section 251.2 paragraph (c) is revised to read as follows:

##### § 251.2 Administration.

(c) Each State agency which has been designated to make distributions of donated foods to emergency feeding organizations and to receive payments for storage and distribution costs in accordance with § 251.8 of this part shall perform those functions pursuant to an agreement entered into with the Department. Such State agencies shall enter into a written agreement with eligible emergency feeding organizations. This agreement shall provide that emergency feeding organizations agree to operate the program in accordance with the requirements of this part, and, as applicable, 7 CFR Part 250. In any case in which an emergency feeding organization will be receiving Federal funds, the agreement shall be effective no longer than one year and shall expire no later than September 30 of each year. The agreement may be renewed at the option of both parties for two additional one-year periods. As part of the renewal process, the emergency feeding organization shall provide any information which has changed since the initial application and updated caseload information.

3. Section 251.4 is amended by redesignating paragraphs (g) and (h) as (h) and (i), respectively. New paragraphs (g) and (j) are added to read as follows:

##### § 251.4 Availability of commodities.

(g) *Availability and control of donated commodities:* Donated commodities shall be made available to

State agencies only for distribution and use in accordance with this part. Except as otherwise provided in § 251.4(f), donated commodities not so distributed or used for any reason shall not be sold, exchanged, or otherwise disposed of without the approval of the Department. However, donated commodities made available under section 32 of Pub. L. 74-320 (7 U.S.C. 612c) may be transferred by emergency feeding organizations, as defined in § 251.3, or recipient agencies, as defined in § 250.3, to any other emergency feeding organization or recipient agency which agrees to use such donated foods to provide without cost or waste, nutrition assistance to individuals in low-income groups. Such transfers shall be effected only with prior authorization of the State agency and, as applicable, the distributing agency. Transfers of any donated commodities between emergency feeding organizations and recipient agencies shall be documented. Such documentation shall be maintained in accordance with §§ 251.10(a) and 250.6(r) by the distributing agency and the State agency responsible for administering TEFAP and made available for review upon request.

(j) *Commodity losses.* (1) the State agency shall be responsible for the loss of commodities:

(i) When the loss arises from the State agency's improper distribution or use of any commodities or failure to provide proper storage, care, or handling; and

(ii) When the State agency fails to pursue claims arising in its favor, fails to provide for the rights to assert such claims, or fails to require its emergency feeding organizations to provide for such rights.

Except as provided in paragraph (j)(4) of this section, the State agency shall begin claims action immediately upon receipt of information concerning the improper distribution, loss of or damage to commodities, and shall make a claim determination within 30 days of the receipt of information, as described in further detail in FNS Instruction 410-1, *Non-Audit Claims—Food Distribution*. The funds received from the collection of claims shall be returned to FNS. In instances in which it has been determined by the Department that the collection of funds will have a significant adverse effect on the operation of the program, the Department may permit in-kind replacement of the donated foods in lieu of payment to FNS. Replacement in kind will only be permitted under such terms and conditions as agreed to by the Secretary.

(2) If the State agency itself causes the loss of commodities and the value exceeds \$250, the State agency shall immediately transmit the claim determination to the FNS Regional Office, fully documented as to facts and findings. Except as provided in paragraph (j)(4) of this section, if the State agency itself causes the loss of commodities, and the value does not exceed \$250, the State agency shall immediately return funds equal to the claim amount to FNS.

(3) If the State agency determines that a claim exists against an emergency feeding organization, warehouseman, carrier or any other entity and the value of the lost commodities exceeds \$2500, the State agency shall immediately transmit the claim determination to the appropriate FNS Regional Office, fully documented as to facts and findings. If FNS determines from its review of the claim determination that a claim exists, the State agency shall make demand for restitution upon the entity liable immediately upon receipt of notice from the FNS Regional Office. Except as provided in paragraph (j)(4) of this section, if the State agency determines that a claim exists in favor of the State agency against an emergency feeding organization, warehouseman, carrier or any other entity and the value of the lost commodities does not exceed \$2500, the State agency shall immediately proceed to collect the claim.

(4) No claim determination shall be required where the value of the lost commodities is \$100 or less. However, no such claim shall be disregarded where:

(i) There is evidence of fraud or a violation of Federal, State or local criminal law; or

(ii) Program operations would be adversely affected.

(5) The State agency shall maintain records and substantiating documents, on all claims actions and adjustments including documentation of those cases in which no claim was asserted because of the minimal amount involved.

(6) In making final claim determinations for commodity losses incurred by emergency feeding organizations when there is no evidence of fraud or negligence, State agencies and FNS Regional Offices, as applicable, shall consider the special needs and circumstances of the emergency feeding organizations, and adjust the claim and/or conditions for claim collection as appropriate. These special needs and circumstances include but are not limited to the emergency feeding organization's use of volunteers and limited financial resources and the

effect of the claim on the organization's ability to meet the food needs of low-income populations.

4. Section 251.6, paragraph (a) is revised to read as follows:

**§ 251.6 Distribution plan.**

(a) *Contents of the plan.* The State agency shall submit for approval by the appropriate FNS Regional Office a plan which contains:

(1) A description of the criteria established in accordance with § 251.5(b) for determining that applicant households are in need of food assistance under this part;

(2) The rates for distributing commodities to households in accordance with § 251.4(d)(3);

(3) A description of the program monitoring system including a detailed explanation of any factors which may contribute to the State requesting approval of exceptions to conducting the minimum number of reviews required by § 251.10(e);

(4) A description of the State's formula for allocating funds to emergency feeding organizations; and

(5) A description of the State's contribution toward the matching requirements as described under § 251.9(e).

**§ 251.9 [Redesignated as § 251.10]**

**§ 251.10 [Amended]**

5. Section 251.9 is redesignated as § 251.10. Paragraph (d) of newly redesignated § 251.10 is removed and paragraphs (e), (f), and (g) are redesignated (d), (e), and (f) respectively.

6. New § 251.9 is added to read as follows:

**§ 251.9 Matching of funds.**

(a) *State matching requirements.* Effective October 1, 1987, States shall provide in cash or in-kind, a contribution equal to the difference between—

(1) The amount of funds received under § 251.8 and

(2) Any part of the amount received by the State and paid by the State to emergency feeding organizations and any part of the amount retained by the State to pay for the direct storage and distribution costs of emergency feeding organizations.

(b) *Exceptions.* In accordance with the provisions of 48 U.S.C. 1469a, American Samoa, Guam, the Virgin Islands and the Northern Mariana Islands shall be exempt from the matching requirements of paragraph (a) of this section if their respective matching requirements are under \$200,000.

(c) *Applicable contributions.* States shall meet the requirements of paragraph (a) of this section through cash or in-kind contributions from non-Federal sources. Such contributions shall meet the requirements set forth in 7 CFR Part 3015, Subpart G. Allowable contributions are only those contributions for costs which would otherwise be allowable as State-level storage and distribution costs. An allowable cash contribution is any cash outlay of the State agency specifically identifiable as a State-level storage and distribution cost, including the outlay of money contributed to the State agency by other public agencies and institutions, and private organizations and individuals.

Examples of cash contributions include, but are not limited to, the purchase of office supplies, storage space, transportation, loading facilities and equipment, employees salaries, and other goods and services specifically identifiable as State-level storage and distribution costs for which there has been a cash outlay by the State agency. Allowable in-kind contributions are any charges, which are non-cash outlays, for real property and non-expendable personal property and the value of goods and services specifically identifiable with State-level storage and distribution costs. Examples of in-kind contributions may include, but are not limited to, the donation of office supplies, storage space, vehicles to transport the commodities, loading facilities and equipment such as pallets and forklifts, and other non-cash goods or services specifically identifiable with State-level storage and distribution costs. In accordance with 7 CFR 3015.53 through 3015.56, the value of donated property shall be the fair market value or the cost of the property to the supplier, whichever is less. In accordance with 7 CFR 3015.52(a), the matching requirement shall not be met by costs supported by another Federal grant, except as provided by Federal statute.

(d) *Assessment fees.* States shall not assess any fees for the distribution of donated foods to emergency feeding organizations.

(e) *Plan requirements.* As a part of the State's Distribution Plan required under § 251.6, State agencies shall submit for FNS Regional office approval, the State's plan for meeting the match required under paragraph (a) of this section. Such plan shall identify the estimated amount of Federal funds to be retained at the State level for State level activities, the estimated dollar value of the State's contribution, and, if applicable, a description and valuation

of in-kind contributions to be applied to the State's required match. This plan may be amended at any time during the fiscal year.

(f) *Reporting requirements.* State agencies shall identify their matching contribution on the SF-269, Financial Status Report, in accordance with § 251.10(d).

(g) *Failure to match.* If, during the course of the fiscal year, the quarterly SF-269 indicates that the State is or will be unable to meet the matching requirements in whole or in part, the Department shall suspend or disallow the unmatched portion of Federal funds subject to the provisions of paragraph (a) of this section. If, upon submission of the final SF-269 for the fiscal year, the Department determines that the State has not met the requirements of paragraph (a) of this section in whole or in part, the unmatched portion of Federal funds subject to the requirements of paragraph (a) of this section shall be subject to disallowance by FNS.

Dated: May 5, 1987.

S. Anna Kondrates,  
Acting Administrator.

[FR Doc. 87-10898 Filed 5-12-87; 8:45 am]

BILLING CODE 3410-30-M

**Agricultural Stabilization and Conservation Service**

**7 CFR Part 760**

**Dairy Indemnity Payment Programs**

**AGENCY:** Agricultural Stabilization and Conservation Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The purpose of this rule is to adopt as final the interim rule published at 51 FR 12986, which amended the Dairy Indemnity Payment Program regulations, with an amendment which would shorten the period for conduct of the program from September 30, 1990, to January 31, 1988.

**EFFECTIVE DATE:** This final rule shall become effective on May 13, 1987.

**FOR FURTHER INFORMATION CONTACT:** Clarence Domire, Agricultural Program Specialist, Emergency Operations and Livestock Programs Division, ASCS, USDA, P.O. Box 2415, Washington, DC 20013; Telephone (202) 447-7673.

**SUPPLEMENTARY INFORMATION:** Information collection requirements contained in this regulation (7 CFR Part 760) have been approved by the Office of Management and Budget (OMB) in accordance with the provisions of 44

U.S.C. Chapter 35 and have been assigned OMB Control No. 0560-0045.

This rule has been reviewed under USDA procedures established in accordance with Executive Order 12291 and Secretary's Memorandum 1512-1 and has been classified as "not major" since it will not result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The title and number of the Federal assistance program to which this rule applies are: Title: Dairy Indemnity Payments; Number: 10.053, as found in the Catalog of Federal Domestic Assistance.

Milton Hertz, Administrator, ASCS, certifies that this action will not increase the federal paperwork burden for industry, small business, and other persons. Therefore the action is exempt from the provisions of the Regulatory Flexibility Act. Additionally, the Regulatory Flexibility Act is not applicable to this rule since the Agricultural Stabilization and Conservation Service (ASCS) is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

It has been determined by an environmental evaluation that this action will have no significant impact on the quality of the human environment. Therefore, neither an environmental assessment nor an Environmental Impact Statement is needed.

The Dairy Indemnity Payment Program was originally authorized by section 331 of the Economic Opportunity Act of 1964 (78 Stat. 508). The statutory authority for the program has been extended several times, most recently by section 152 of the Food Security Act of 1985 (99 Stat. 1337) which authorized the program to be carried out through September 30, 1990. The objective of the program is to indemnify dairy farmers and manufacturers of dairy products who, through no fault of their own, suffer income losses with respect to milk or milk products which are removed from commercial markets because such products contain certain harmful residues. In addition, dairy farmers can also be indemnified for income losses with respect to milk which is required to be removed from commercial markets

due to residues of chemicals or toxic substances or contamination by nuclear radiation or fallout.

An interim rule amending the Dairy Indemnity Payment Program was published in the *Federal Register* on April 17, 1986 (51 FR 12986). The interim rule extended the time period for conducting the program from September 30, 1985 to September 30, 1990. However, the Department estimates that Congressionally appropriated funds for the program will be exhausted by January 31, 1988. Therefore, an expiration date of January 31, 1988 is provided for at this time.

The interim rule also extended the final date by which applications for payment must be filed with the county ASCS office for the county where the farm headquarters are located to no later than December 31 following the fiscal year in which the loss occurred, or such later date as the Deputy Administrator may specify.

In addition, the interim rule amended the regulations to prevent manufacturers from receiving what is considered to be a "double indemnity," i.e., compensation for the same loss by the Department of Agriculture and the person (or the representative or successor in interest of such person) responsible for such loss. A similar provision was applied to producers in the 1979 revision of the regulations. If the manufacturer is compensated for the same loss by the person responsible for the loss, the manufacturer is required to refund to the Department of Agriculture the amount of the indemnity payment which is equal to the amount of the compensation which is received by the manufacturer.

The interim rule provided for a 30-day comment period; however, no comments were received. Therefore, it has been determined that the interim rule should be adopted as final with the expiration date for conduct of the program changed from September 30, 1990 to January 31, 1988.

#### List of Subjects in 7 CFR Part 760

Dairy producers, Indemnity payments, Pesticides, Pests.

Accordingly, the interim rule amending 7 CFR Part 760 which was published at 51 FR 12986 on April 17, 1986, is adopted as a final rule with the following change:

#### PART 760—DAIRY INDEMNITY PAYMENT PROGRAM

1. The authority citations for 7 CFR Part 760 continues to read:

Authority: Secs. 1, 2, and 3, 99 Stat. 1337, as amended (7 U.S.C. 450j, k, and l).

#### § 760.2 [Amended]

2. In § 760.2, paragraphs (k) (1) and (2), (l), and (o) are amended by striking out "September 30, 1990" and inserting in lieu thereof "January 31, 1988".

Signed at Washington, DC, on May 8, 1987.  
Milton J. Hertz,

Administrator, Agricultural Stabilization and Conservation Service.

[FR Doc. 87-10922 Filed 5-12-87; 8:45 am]

BILLING CODE 3410-05-M

#### DEPARTMENT OF TRANSPORTATION

#### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 87-NM-37-AD; Amdt. 39-5621]

#### Airworthiness Directives; Boeing Model 737 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 737 series airplanes, which requires inspection of the forward service doorway aft frame around the lower four door stop fittings and repair, if necessary. This action is prompted by recent reports of cracks in the lower door stop support structure. This condition, if not corrected, could result in loss of pressurization, substantial structural damage, and loss of the door.

**EFFECTIVE DATE:** June 1, 1987.

**ADDRESSES:** The applicable service information may be obtained from the Boeing Commercial Airplane Company, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

**FOR FURTHER INFORMATION CONTACT:** Mr. James W. Hart, Jr., Airframe Branch, ANM-120S; telephone (206) 431-1920. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

**SUPPLEMENTARY INFORMATION:** Recent service experience has shown that cracks have developed in the forward service doorway aft frame on Boeing Model 737 series airplanes around the lower door stop fittings (Numbers 3 through 6), as well as in the backup structure for these door stops. Cracking

in these areas, if not detected and repaired, could compromise the structural integrity of the door support structure, which could lead to loss of pressurization, substantial structural damage, and possible loss of the door.

The FAA has reviewed and approved Boeing Alert Service Bulletin 737-53A1108, Revision 1, dated March 12, 1987, which describes procedures for inspection for cracks in the forward service doorway aft frame structure and repairs.

Since this condition is likely to exist or develop on other airplanes of the same type design, this AD requires repetitive inspections of the aft door frame around the lower four door stops, and repair, if necessary, in accordance with the service bulletin previously mentioned. If cracks are found in the frame, it is necessary to inspect the intercostals and stringers which back up the door stops. An optional terminating action is provided. [It should be noted that AD 87-01-06, Amendment 39-5509 (52 FR 517; January 7, 1987), requires inspections of the upper two door stop fittings of the forward service doorway aft frame.]

Since a situation exists that requires immediate adoption of this regulation, it is found that notice and public procedure hereon are impracticable, and good cause exists for making this amendment effective in less than 30 days.

The FAA has determined that this regulation is an emergency regulation that is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been further determined that this document involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If this action is subsequently determined to involve a significant/major regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation is not required).

#### List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

#### Adoption of the Amendment

#### PART 39—[AMENDED]

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal

Aviation Regulations (14 CFR 39.13) as follows:

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. By adding the following new airworthiness directive:

**Boeing:** Applies to Model 737 series airplanes, Line Numbers 1 through 1426, except the T43 series, certificated in any category. Compliance required as indicated, unless previously accomplished.

To ensure structural integrity of the forward galley door support structure, accomplish the following:

A. Prior to the accumulation of 25,000 landings or within the next 125 landings after the effective date of this AD, whichever occurs later, perform a close visual inspection of the forward service doorway aft frame around the lower four door stop fittings, in accordance with Boeing Alert Service Bulletin 737-53A1108, Revision 1, dated March 12, 1987, or later FAA-approved revision. Repeat the inspections at intervals not to exceed 250 landings. If cracks are found, prior to further flight, perform a visual inspection for cracks in the intercostals and stringers, which support the aft door stops. Parts found cracked must be repaired prior to further flight in accordance with Boeing Alert Service Bulletin 737-53A1108, Revision 1, or later FAA-approved revision.

B. The repetitive inspections required by paragraph A above, may be terminated after the intercostals and stringers have been repaired in accordance with Boeing Alert Service Bulletin 737-53A1108, Revision 1, dated March 12, 1987, or later FAA-approved revisions, or incorporation of a modification approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

C. An alternate means of compliance or adjustment of the compliance time, which provide an acceptable level of safety and which has the concurrence of an FAA Principal Maintenance Inspector, may be used when approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

D. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of inspections and/or modifications required by this AD.

All persons affected by this directive who have not already received the appropriate service information from the manufacturer may obtain copies upon request to the Boeing Commercial Airplane Company, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft

Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective June 1, 1987.

Issued in Seattle, Washington, on May 6, 1987.

Wayne J. Barlow,

Director, Northwest Mountain Region.

[FR Doc. 87-10861 Filed 5-12-87; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 86-NM-169-AD; Amdt. 39-5622]

#### Airworthiness Directives; CASA Model C-212 Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD), applicable to certain CASA Model C-212 series airplanes, which requires modification of the crew door to provide a protective cover for the internal door handle. Installation of the protective cover is necessary to preclude inadvertent opening of the door in flight.

**EFFECTIVE DATE:** June 19, 1987.

**ADDRESSES:** The service bulletin specified in this AD may be obtained upon request to Construcciones Aeronauticas S.A., Getafe, Madrid, Spain. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

**FOR FURTHER INFORMATION CONTACT:** Ms. Judy Golder, Standardization Branch, ANM-113; telephone (206) 431-1967. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

**SUPPLEMENTARY INFORMATION:** A proposal to amend Part 39 of the Federal Aviation Regulations to include an airworthiness directive, which requires the installation of a protective cover over the crew door internal handle on certain Construcciones Aeronauticas S.A. (CASA) Model C-212 series airplanes, was published in the Federal Register on September 26, 1986 (51 FR 33618).

Interested parties have been afforded an opportunity to participate in the making of this amendment. Due

consideration has been given to the two comments received.

Two commenters questioned the basis for the unsafe condition addressed in the proposal. Both commenters pointed out that the CASA C-212 is not a pressurized aircraft, and due to the design configuration, it would be improbable that passengers would be in the vicinity of the crew door internal handle; therefore, no hazardous condition would exist in this environment. While the FAA agrees that the CASA C-212 is an unpressurized airplane, it does not concur with the suggestion that an unsafe condition does not exist. The basis for and intent of the rule is to eliminate the hazard presented by an inadvertently opened door. The FAA has determined this unsafe condition can be eliminated by modifying the internal handle of the crew door on all configurations of the airplane so that it requires deliberate action to open, in flight or on the ground, and cannot be inadvertently opened by any person, crew member or passenger, who might lean or fall against the handle.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

It is estimated that 32 airplanes of U.S. registry will be affected by this AD, that it will take approximately 3 manhours per airplane to accomplish the required actions, and that the average labor cost will be \$40 per manhour. Modification parts are estimated at \$316 per airplane. Based on these figures, the total cost impact of this AD to U.S. operators is estimated to be \$13,952.

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979) and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic effect on a substantial number of small entities because of the minimal cost of compliance per airplane (\$436). A final evaluation has been prepared for this regulation and has been placed in the docket.

#### List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

#### Adoption of the Amendment

#### PART 39—[AMENDED]

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration

amends § 39.13 of Part 39 of the Federal Aviation Regulations as follows:

1. The authority citation for Part 39 continues to read as follows:

**Authority:** 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. By adding the following new airworthiness directive:

**CASA:** Applies to CASA Model C-212 series airplanes, serial numbers as listed in CASA Service Bulletin 212-52-16, dated October 23, 1985, certificated in any category. Compliance is required within 9 months after the effective date of this AD. To prevent inadvertent opening of the crew door, accomplish the following, unless previously accomplished:

A. Install a protective cover over the crew door internal handle in accordance with CASA Service Bulletin 212-52-16, dated October 23, 1985.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of the modification required by this AD.

All persons affected by this directive who have not already received the appropriate service document from the manufacturer may obtain copies upon request to Construcciones Aeronauticas S.A., Getafe, Madrid, Spain. This document may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective June 19, 1987.

Issued in Seattle, Washington, on May 6, 1987.

Wayne J. Barlow,

Director, Northwest Mountain Region.

[FR Doc. 87-10859 Filed 5-12-87; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 71

[Airspace Docket No. 87-AGL-3]

#### Establishment of Transition Area; Peru, IL

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The nature of this action is to establish the Peru, Illinois, transition area to accommodate a new NDB

Runway 18 Standard Instrument Approach Procedure (SIAP) to Illinois Valley Regional—Walter A. Duncan Field Airport.

The intended effect of this action is to ensure segregation of the aircraft using approach procedures in instrument conditions from other aircraft operating under visual weather conditions in controlled airspace.

**EFFECTIVE DATE:** 0901 UTC, July 30, 1987.

**FOR FURTHER INFORMATION CONTACT:** Edward R. Heaps, Air Traffic Division, Airspace Branch, AGL-520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (312) 694-7360.

#### SUPPLEMENTARY INFORMATION:

##### History

On Friday, February 27, 1987, the Federal Aviation Administration (FAA), at the request of the State of Illinois and the Illinois Valley Regional Airport Authority, proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to establish the Peru, Illinois, transition area (52 FR 6002).

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. Comments were received from nine individuals including Ms. Linda Hamer, and Messrs. Wilbur Hahn, Mel Forrester, Ivan E. Bayer, Gerald J. Funfsinn, Billy R. Hall, Phillip Buland, Charles Keutzer, and Gerald Hamer. All commenters objected to the proposed action.

All letters received indicated a concern for potential conflict between visual flight rules (VFR) practice NDB approaches and routine VFR traffic in the area. Pilots, whether on a VFR or instrument flight rule (IFR) flight plan, when in visual meteorological conditions (VMC) are required to apply see-and-avoid procedures to separate themselves as necessary from other traffic. The establishment of the transitional airspace will increase the VFR weather visibility/cloud clearance requirements between 1200' and 700' above the surface and will enhance safety as it will afford a greater opportunity to apply the see-and-avoid concept.

Several letters indicated concern for the potential greater mix of aircraft, i.e., jet versus single engine piston, that would result from the new SIAP. The current situation in the area permits that mix and no significant increase in jet traffic is anticipated based on the publication of the instrument procedure. The primary function of the SIAP is to

provide access to the Peru area during weather conditions which now normally would preclude this from occurring. It was concluded that the VFR concerns expressed did not represent a problem generated by the designation of the transition area and procedural establishment but rather were associated with generic VFR and VMC aircraft operational safety considerations.

Three commenters expressed concern that an existing acrobatic area would be affected by this proposal. Study confirmed that the acrobatic area and the transition area would not be compatible. However, study also disclosed that a minor relocation of that acrobatic area could accommodate both the need for an acrobatic area and the need for airspace associated with an instrument approach procedure as well as providing for an efficient use of the available airspace in the area of concern. Action will be initiated by the FAA office responsible for the Certificate of Waiver in association with the FAA area controlling facility to accommodate both needs.

One commenter stated concern that the Minimum Descent Altitude (MDA) may be established below the 700' floor of controlled airspace. That is a routine practice when establishing an instrument procedure. The MDA is primarily associated with obstruction clearances and communication capabilities; does not involve the separation of aircraft; and, does not waive any existing federal regulations for pilots when operating in either IFR or VFR in uncontrolled airspace.

One commenter requested a hearing while stating that the establishment of the transition area would require flight in icing conditions, would require the purchase of additional radio and deicing equipment, and would cause delay while awaiting an IFR clearance.

Informal hearings are held when deemed necessary by the FAA for the purpose of gathering additional facts and information relevant to the rulemaking under consideration. In this matter it was determined that the information already available was sufficient for the purpose intended and that a hearing was not required. Concerning equipment needs, it is to be noted that radio and/or deicing equipment not presently required would still not be required as a result of the proposed action. IFR clearances would be required to operate in the transition area only during periods when flight weather conditions were below three (3) miles visibility and/or 1000' ceiling.

Traffic pattern operations up to and including 700' above the surface would

not be affected and flight to the south or west for a short distance to clear the area would eliminate any change in IFR clearance requirements. That commenter also questioned the statement in the Notice of Proposed Rulemaking that the intended action did not constitute a "major rule" under Executive Order 12291 or a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034). Because there would be no significant impact on the operation and use of the underlying airports, the FAA believes that the economic effects of this action will be minimal and certainly well below the criteria for determination as either a "major rule" or "significant rule".

There were other comments which were non-aeronautical in substance that should be settled between the individual area airport operators and which were not made part of this study.

In finalizing the procedural alignment it was found necessary to amend the reference Valley NDB bearing from 332° to 335° and that change is reflected in the rule.

Except for editorial changes, this amendment is the same as that proposed in the notice. Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6C dated January 2, 1987.

#### The Rule

This amendment to Part 71 of the Federal Aviation Regulations establishes the Peru, Illinois, transition area to accommodate aircraft utilizing an NDB Runway 18 SIAP.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 14 CFR Part 71

Aviation safety, Transition areas.

#### Adoption of the Amendment

#### PART 39—[AMENDED]

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended as follows:

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; E.O. 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

#### § 71.181 [Amended]

2. Section 71.181 is amended as follows:

#### Peru, IL [New]

That airspace extending upward from 700 feet above the surface within a 5 mile radius of Illinois Valley Regional—Walter A. Duncan Field Airport (lat. 41°20'58" N., long. 89°09'14" W.); and within 3 miles either side of the Valley NDB (VYS) 335° bearing extending from the 5 mile radius to 8.5 miles northwest of the Valley NDB.

Issued in Des Plaines, Illinois, on April 28, 1987.

Teddy W. Burcham,

Manager, Air Traffic Division.

[FR Doc. 87-10856 Filed 5-12-87; 8:45 am]

BILLING CODE 4910-13-M

#### TENNESSEE VALLEY AUTHORITY

#### 18 CFR Part 1301

#### Freedom of Information Act; Schedule of Fees

AGENCY: Tennessee Valley Authority (TVA).

ACTION: Final rule.

**SUMMARY:** This rule amends TVA's schedule of fees for processing requests for records which are made available for public inspection. The Freedom of Information Reform Act of 1986 requires agencies to issue final regulations in conformance with the Office of Management and Budget (OMB) guidelines and schedule of fees.

**EFFECTIVE DATE:** June 12, 1987.

**ADDRESS:** Comments should be sent to Craven Crowell, Director, Office of Information, Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tennessee 37902.

**FOR FURTHER INFORMATION CONTACT:** Gilbert D. Francis, Jr., (615) 632-6000.

**SUPPLEMENTARY INFORMATION:** TVA published a proposed rule in the Federal Register on April 3, 1987 [52 FR 10772] on the revision of its schedule of fees for processing requests for records which

are made available for public inspection. No comments were received.

This final rule reflects changes in OMB's guidelines and schedule of fees. Revisions, including minor clarifications, were made by TVA to a number of definitions, the fees applicable to computer searches, and other aspects of its schedule of fees.

This rule is not a major rule for the purpose of Executive Order 12291. As required by the Regulatory Flexibility Act, it is hereby certified that this rule will not have a significant impact on small business entities.

#### List of Subjects in 18 CFR Part 1301

Administrative practice and procedures, Freedom of information, Privacy, Sunshine Acts.

For the reasons set forth in the preamble, Title 18, Chapter XIII of the Code of Federal Regulations is amended as follows:

#### PART 1301—PROCEDURES

1. The authority for Part 1301, Subpart A, is revised to read as follows:

Authority: 16 U.S.C. 831-831dd, 5 U.S.C. 552, 18 U.S.C. 208(b).

2. Section 1301.2 is revised to read as follows:

##### § 1301.2 Schedule of fees.

(a) *Basis.* Except as otherwise provided in paragraph (d) of this section, TVA records available for public inspection under § 1301.1 are made available upon payment of uniform fees which will approximately cover the direct costs to TVA of searching for, duplicating, and in the case of commercial requesters, reviewing the records.

(b) *Definitions.*—(1) *Search.* The term "search" includes all time spent looking for material that is responsive to a request, including page-by-page and/or line-by-line identification of material within records, and computer searches using existing programming.

(2) *Duplication.* The term "duplication" refers to the process of making a copy of a record necessary to respond to a request. Such copies can take the form of paper copy, microform, audiovisual materials, or machine-readable documentation (e.g., magnetic tape or disk), among others.

(3) *Review.* The term "review" refers to them initial process of examining records located in response to a commercial use request to determine whether any portion of any record located is permitted to be withheld. It also includes processing any records for disclosure, e.g., doing all that is

necessary to excise them and otherwise prepare them for release.

(4) *Commercial use request.* The term "commercial use request" refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether the requester properly belongs in this category, TVA will determine the use to which the requester will put the records sought. Where TVA has reasonable cause to doubt the use to which the requester will put the records sought, or where the use is not clear from the request itself, TVA may seek additional clarification.

(5) *Educational institution.* The term "educational institution" refers to a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(6) *Noncommercial scientific institution.* The term "noncommercial scientific institution" refers to an institution that is not operated on a commercial basis and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(7) *Representative of the news media.* The term "representative of the news media" refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. News is any information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public, and publishers of periodicals who make their products available for purchase or subscription by the public. A free-lance journalist may be regarded as working for a news entity if that journalist can demonstrate a solid basis for expecting publication through that entity, even though not actually employed by it.

(c) *Fees.* The following fees are applicable:

(1) *Search time charges for other than computer searches.* For time spent by clerical employees in searching files, the charge is \$8.35 per hour. For time spent by supervisory and professional employees, the charge is \$19.75 per hour.

(2) *Duplication charges.* For photostatic reproduction of requested

material which consists of sheets no larger than 8½ by 14 inches, the charge is 10 cents per page. For reproduction of other materials, the charge is the direct cost of photostat or other means necessarily used for duplication.

(3) *Review charges.* For initial review of documents in response to a commercial use request, the time spent reviewing them to determine whether they are exempt from mandatory disclosure is charged at the same rates as search time.

(4) *Charges for computer searches.* For computer searches, the charge is the direct cost of providing the service, including the cost of operating the central processing unit for that portion of operating time that is directly attributable to searching for responsive records, and operator/programmer salary apportionable to the search.

(5) *Other charges.* Where a response to a request requires services (including personnel) or materials other than the ones described in paragraphs (c)(1), (2), (3), and (4) of this section, the charge is the full cost of any such services and materials which TVA agrees to provide, but only if the requester has been notified of such cost before it is incurred, or if the request contains a statement accepting responsibility for the cost to be incurred. Such services or materials (provided at TVA's discretion) include:

(i) Certifying that records are true copies;

(ii) Sending records by special methods such as express mail, etc.

(d) *Waiver of fees and services provided without charge.* (1) TVA waives or reduces fees otherwise chargeable under this section if TVA determines that disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester.

(2) Except for documents provided in response to a commercial use request, the first 100 pages of duplication and the first 4 hours of search time will be provided without charge. Educational and noncommercial scientific institution requesters who seek records for scholarly or scientific research and representatives of the news media are not charged search time.

(3) No fee is charged to any requester if the cost of collecting the fee would be equal to or greater than the fee itself.

(e) *Assessment and collection of fees.*

(1) Interest may be charged to those requesters who fail to pay fees charged. Interest may begin to be assessed on the

amount billed on the 31st day following the day on which the billing was sent but any interest assessed will accrue from the date of the billing. Interest will be at the rate prescribed in 31 U.S.C. 3717.

(2) If TVA reasonably believes that a requester or group of requesters is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees. TVA may aggregate any such requests and charge accordingly.

(3) If TVA determines that the allowable charges a requester may be required to pay are likely to exceed \$250, TVA may require a requester to make an advance payment of an amount up to the full estimated charges if the requester has no history of prompt payment. If the requester has such a history, TVA may notify the requester of the estimated charges and if a satisfactory assurance of full payment is obtained, will not require an advance payment under this provision. The administrative time limits prescribed in § 1301.1(c) of this part will begin to run only after TVA has received any payment required to be made in advance under this provision.

(4) Where a requester has previously failed to pay a fee charged in a timely manner (within 30 days of the date of billing), TVA may require the requester to pay the full amount owed plus any applicable interest as provided in paragraph (e)(1) of this section and to make an advance payment of the full estimated charges before the agency begins to process a new request or a pending request from the requester. The administrative time limits prescribed in § 1301.1(c) of this part will begin to run only after TVA has received any payment required to be made in advance under this provision.

(5) TVA may assess charges for time spent searching, even if TVA fails to locate the records or if records located are determined to be exempt from disclosure.

W.F. Willis,

General Manager.

[FR Doc. 87-10640 Filed 5-12-87; 8:45 am]

BILLING CODE 8120-01-M

## ENVIRONMENTAL PROTECTION AGENCY

### 21 CFR Parts 193 and 561

[FAP 7H5529/R888; FRL 3196-5]

### 3-(3,5-Dichlorophenyl)-5-Ethenyl-5-Methyl-2,4-Oxazolidinedione

**AGENCY:** Environmental Protection Agency (EPA).

## **ACTION:** Final rule.

**SUMMARY:** The rules established food and feed additive regulations to permit the combined residues of the fungicide 3-(3,5-dichlorophenyl)-5-ethenyl-5-methyl-2,4-oxazolidinedione (hereafter referred to in the preamble as "vinclozolin") and its metabolites containing the 3,5-dichloroaniline moiety in or on certain food and feed items. This regulation, to establish a maximum permissible level for combined residues of vinclozolin in or on commodities was requested in a petition submitted by BASF Wyandotte Corp.

**EFFECTIVE DATE:** Effective on May 13, 1987.

**ADDRESS:** Written objections may be submitted to the Hearing Clerk (A-110), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

## **FOR FURTHER INFORMATION CONTACT:**

By Mail: Lois A. Rossi, Product Manager (PM) 21, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Office location and telephone number: Room 227, CM#2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703-557-1900).

**SUPPLEMENTARY INFORMATION:** EPA issued a notice, published in the *Federal Register* of March 18, 1987 (52 FR 8526), which announced that BASF Wyandotte Corp., Agricultural Chemical Division, 110 Cherry Hill Road, Parsippany, New Jersey 07054 submitted a food/feed additive petition (FAP 7H5529) proposing to establish food/feed additive regulations for the combined residues of the fungicide vinclozolin and its metabolites in or on the raisins at 30 parts per million (ppm), and grape pomace (dry) at 42 ppm. These regulations will expire on May 13, 1988, unless processing data on raisins are submitted. In order for these regulations to remain in effect beyond this 1 year period, that data must indicate that residues do not concentrate to a level above 30 ppm in the raisins.

The data submitted in the petition and all other relevant material have been evaluated and discussed in a related document [PP 1E2457/R887], appearing elsewhere in this issue of the *Federal Register*, which establishes a tolerance for the combined residues of vinclozolin on grapes.

Residue data submitted in support of these regulations, and other available data, demonstrate that vinclozolin residues concentrate as the water content of the commodity decreases. The theoretical dry down factor for raisins is 4.7. Therefore, the regulations

for residues of vinclozolin and its metabolites on raisins reflect a 5-fold theoretical dry down factor. If, after 1 year, residue data on raisins have not been submitted, these regulations will expire. In order for the regulations to continue to be in effect, the residue data must indicate that residues do not concentrate to a level above 30 ppm in the raisins.

The nature of the residues is adequately understood and an adequate analytical method, gas chromatography using an electron capture detector, is published in Vol. II of the Food and Drug Administration (FDA) Pesticide Analytical Manual for enforcement purposes. There is no reasonable expectation of residues in eggs, milk, meat, or poultry from the use on grapes.

The pesticide is considered useful for the purpose for which the food and feed additive regulations are sought, and it is concluded that the establishment of these regulations will protect the public health. Therefore, the regulations will protect the public health. Therefore, the regulations are established for one year as set forth below.

Any person adversely affected by these regulations may, within 30 days after publication of this rule in the *Federal Register*, file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulations deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing and the grounds for the objections.

The Office of Management and Budget has exempted these rules from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601 through 612), the Administrator has determined that regulations establishing new food or feed additive levels, or conditions for safe use of additives, or raising such food or feed additive levels do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the *Federal Register* of May 4, 1981 (46 FR 24950).

## List of Subjects in 21 CFR Parts 193 and 561

Food additives, Animal feeds, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 28, 1987.

Douglas D. Camp, Jr.

Director, Office of Pesticide Programs.

Therefore, Chapter I of 21 CFR is amended as follows:

## PART 193—[AMENDED]

### 1. In Part 193:

a. The authority citation for Part 193 continues to read as follows:

Authority: 21 U.S.C. 348.

b. Section 193.137 is amended by designating the existing introductory paragraph and list of foods as paragraph (a) and adding paragraph (b) to read as follows:

#### § 193.137 3-(3,5-Dichlorophenyl)-5-ethenyl-5-methyl-2,4-oxazolidinedione.

(a) \* \* \*

(b) A food additive regulation is established until May 13, 1988, for the combined residues of the fungicide, 3-(3,5-dichlorophenyl)-5-ethenyl-5-methyl-2,4-oxazolidinedione, and its metabolites containing the 3,5-dichloroaniline moiety in or on the following processed foods when present therein as a result of application to grapes:

Foods	Parts per million
Raisins.....	30

## PART 561—[AMENDED]

### 2. In Part 561:

a. The authority citation for Part 561 continues to read as follows:

Authority: 21 U.S.C. 348.

b. Section 561.440 is added, to read as follows:

#### § 561.440 3-(3,5-Dichlorophenyl)-5-ethenyl-5-methyl-2,4-oxazolidinedione.

A feed additive regulation is established until May 13, 1988, for the combined residues of the fungicide, 3-(3,5-dichlorophenyl)-5-ethenyl-5-methyl-2,4-oxazolidinedione and its metabolites containing the 3,5-dichloroaniline moiety in or on the processed feeds when present therein as a result of application to grapes:

Feeds	Parts per million
Grape, pomace, dry.....	42.0

## 21 CFR Parts 193 and 561

[FAP 7H5518/R889; FRL 3200-9]

### Pesticides Tolerances in Foods; Avermectin B<sub>1</sub>

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

**SUMMARY:** These rules establish a food additive and a feed additive regulation to permit residues of the miticide/insecticide avermectin B<sub>1</sub> and its delta 8,9-geometric isomer in citrus oil and dried citrus pulp, respectively, in accordance with an experimental program. These regulations to establish a maximum permissible level of the miticide/insecticide in citrus oil and dried citrus pulp were requested by Merck and Co., Inc., Merck Sharp & Dohme Research Laboratories.

**EFFECTIVE DATE:** Effective on May 8, 1987.

**ADDRESS:** Written objections, identified by the document control number [FAP 7H5518/R889], may be submitted to the: Hearing Clerk (A-110), Environmental Protection Agency, Room 3708, 401 M Street, SW., Washington, DC 20460.

#### FOR FURTHER INFORMATION CONTACT:

By mail: George LaRocca, Product Manager (PM) 15, Registration Division (TS-767C), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Office location and telephone number: Room 202, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-557-2400.

**SUPPLEMENTARY INFORMATION:** EPA issued a notice, published in the *Federal Register* of December 3, 1986 (51 FR 43663), which announced that Merck and Co., Inc., Merck Sharp & Dohme Research Laboratories, Hillsborough Rd., Three Bridges, NJ 08887, had submitted a feed additive petition proposing to amend 21 CFR Parts 193 and 561 by establishing regulations to permit residues of the miticide/insecticide avermectin B<sub>1</sub> [a mixture of avermectins containing >80 percent avermectin B<sub>1a</sub> (5-0 demethyl avermectin A<sub>1a</sub>) and <20 percent avermectin B<sub>1b</sub> (5-0-demethyl-25-de-(1-methylpropyl)-25-(1-methylethyl) avermectin A<sub>1a</sub>)] and its delta 8,9-geometric isomer in citrus oil at 0.10 part per million (ppm) and dried citrus pulp at 0.10 ppm in connection with an experimental use permit.

There were no comments received in response to the notice of filing.

The pesticide may be safely used in the prescribed manner when such use is

in accordance with the label and labeling registered pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended (86 Stat. 751, 7 U.S.C. 135(a) *et seq.*). It has further been determined that since residues of the miticide/insecticide may result in citrus oil and dried citrus pulp from the agricultural use provided for in the experimental use permit the feed additive regulation should be established and should include a tolerance limitation.

The data submitted in the petition and other relevant material have been evaluated. The toxicological data considered in support of the tolerance include a 14-week rat gavage study with a no-observed-effect level (NOEL) of >0.4 milligram (mg)/kilogram (kg)/day, highest dose tested (HDT); an 18-week gavage study in dogs with a NOEL of 0.25 mg/kg/day; a rat teratology study (avermectin B<sub>1</sub>) which was negative for terata up to 1.6 mg/kg/day (HDT); a rabbit teratology study (avermectin B<sub>1</sub>) which was negative for terata up to 2.0 mg/kg/day (HDT); a mouse teratology study (avermectin B<sub>1</sub>) with a teratogenic lowest effect level (LEL) of 0.4 mg/kg/day (cleft palate) and a teratogenic NOEL of 0.02 mg/kg/day; a mouse teratology study (delta-8,9-isomer) with a teratogenic LEL of 0.10 mg/kg/day (cleft palate) and a teratogenic NOEL of 0.06 mg/kg/day; a mouse maternotoxicity study (avermectin B<sub>1</sub>) with a LEL of 0.075 mg/kg/day (lethality) and a NOEL of 0.05 mg/kg/day; a mouse maternotoxicity study (delta-8,9-isomer) with a LEL of 0.50 mg/kg/day (lethality) and a NOEL of 0.10 mg/kg/day; a two-generation rat reproduction study with a NOEL of 0.12 mg/kg/day and a rat metabolism study. Studies on mutagenicity demonstrated an overall negative potential.

The Provisional Acceptable Daily Intake (PADI) is based on the NOEL of 0.12 mg/kg/day in the two-generation rat reproduction study using a 1,000-fold safety factor to calculate the PADI. The proposed use would result in a theoretical maximum residue contribution (TMRC) for the U.S. population average of 0.000038 mg/kg/day, which would utilize 32 percent of the PADI. The most highly exposed subgroups would be nonnursing infants (88 percent of the PADI) and children 1 to 6 years of age (77 percent of the PADI).

The metabolism of avermectin B<sub>1</sub> and its delta 8,9-geometric isomer is adequately understood for this use. An adequate analytical method, liquid chromatography, is available for enforcement purposes.

[FR Doc. 87-10360 Filed 5-12-87; 8:45 am]

BILLING CODE 6560-50-M

Because of the long lead time from establishing this temporary tolerance to publication of the enforcement methodology in the Pesticide Analytical Manual, Vol. II, the analytical methodology is being made available in the interim to anyone interested in pesticide enforcement when requested from:

By mail: William Grosse, Chief, Information Service Branch (TS-767C), Program Management and Support Division, Office of Pesticide Programs, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Office location and telephone number: Registration Division, Room 223, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703) 557-2613.

No actions are currently pending against the experimental use of this miticide/insecticide.

The scientific data reported and other relevant material have been evaluated, and the Agency concludes that the pesticide may be safely used in the prescribed manner when such use is in accordance with the label and labeling registered pursuant to FIFRA, as amended (86 Stat. 973, 89 Stat. 751, 7 U.S.C. 135(a) *et seq.*) and is established as set forth below.

Any person adversely affected by this regulation may, within 30 days after publication of this document in the **Federal Register** file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing and the grounds for the objections. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601 through 612), the Administrator has determined that regulations establishing new food or feed additive levels, or conditions for safe use of additives, or raising such food or feed additive levels do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** May 4, 1981 (46 FR 24945).

(Sec. 490(c)(1), 72 Stat. 1786 (21 U.S.C. 348(c)(1)))

#### List of Subjects in 21 CFR Parts 193 and 561

Food Additives, Feed additives, Pesticides and pests.

Dated: May 7, 1987.

Douglas D. Campt,

Director, Office of Pesticide Programs.

#### PART 193—[AMENDED]

Therefore, 21 CFR Chapter I is amended as follows:

##### 1. In Part 193:

a. The authority citation continues to read as follows:

Authority: 21 U.S.C. 348.

b. By adding new § 193.473, to read as follows:

##### § 193.473 Avermectin B<sub>1</sub> and its delta 8,9-geometric isomer.

A temporary tolerance of 0.10 part per million is established for residues of the miticide/insecticide avermectin B<sub>1</sub> and its delta 8,9-geometric isomer in citrus oil resulting from application of the miticide/insecticide to the growing citrus crop. Such residues may be present therein only as a result of the application of the miticide/insecticide in accordance with the provisions of the experimental use permit number 618-EUP-12 that expires May 8, 1988.

#### PART 561—[AMENDED]

##### 2. In Part 561:

a. The authority citation continues to read as follows:

Authority: 21 U.S.C. 348.

b. New § 561.441 is added, to read as follows:

##### § 561.441 Avermectin B<sub>1</sub> and its delta 8,9-geometric isomer.

A temporary tolerance of 0.10 part per million is established for residues of the insecticide/miticide avermectin B<sub>1</sub> and its delta 8,9-geometric isomer in or on dried citrus pulp resulting from application of the insecticide/miticide to citrus fruits. Such residues may be present therein only as a result of the application of the miticide-insecticide in accordance with the provisions of the experimental use permit number 618-EUP-12 that expires May 8, 1988.

[FR Doc. 87-11032 Filed 5-12-87; 8:45 am]

BILLING CODE 6560-50-M

#### DEPARTMENT OF STATE

#### 22 CFR Parts 41 and 42

[Department Regulation 108-858]

#### Visas: Documentation of Nonimmigrants and Immigrants; Miscellaneous Amendments

AGENCY: Department of State.

ACTION: Interim rule.

**SUMMARY:** In order to conform with decisions made by the Board of Immigration Appeals in *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981) and *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981), the Department of State amends its regulations relating to certain classes of aliens which have been affected by those decisions. This rule adds new language to 22 CFR 41.91(a) (9) and (10) and 22 CFR 42.91(a) (9) and (10), which affects an alien's eligibility to receive a visa because of criminal offenses involving moral turpitude which the alien committed prior to the age of fifteen or between the ages of fifteen and eighteen. Affected by this rule are those aliens who have been convicted of a certain criminal offense during a certain period of their lives, and who are ineligible to receive a visa because of that conviction.

Current regulations consider all aliens who had been tried and treated as juveniles by a juvenile court for a turpitudinous offense committed while under the age of eighteen years not to be ineligible under section 212(a)(9) of the Immigration and Nationality Act. The new regulations set different standards for qualifying for juvenile treatment. This rule is based on decisions made by the Board of Immigration Appeals and by Pub. L. 98-473 affecting Titles 18 and 21 of the U.S. Code.

**EFFECTIVE DATE:** May 13, 1987. The Department, however, will consider written comments submitted on or before June 5, 1987, and reserves the right to make necessary modifications to this interim rule in the light of those comments.

**ADDRESS:** Stephen K. Fischel, Chief, Legislation and Regulations Division, Visa Services, Washington, DC 20520 (202) 663-1204.

**FOR FURTHER INFORMATION CONTACT:** Stephen K. Fischel or Guida Evans-Magher, Legislation and Regulations Division, Visa Services, Washington, DC 20520 (202) 663-1206.

**SUPPLEMENTARY INFORMATION:** In *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981) and *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981), the

Board of Immigration Appeals held that conduct underlying a foreign conviction which constitutes an act of juvenile delinquency under United States standards, however treated by a foreign court, is not a crime for purposes of section 212(a)(9) of the Immigration and Nationality Act. In the *Ramirez-Rivero* decision the BIA emphasized "the . . . desirability of a rule which provides national uniformity in the administration of a federal statute such as the (INA)." Standards established by Congress as embodied in the Federal Juvenile Delinquency Act (FJDA), 18 U.S.C. 5031 *et seq.*, as amended by the Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. 93-415, 88 Stat. 1133, govern whether an offense is to be considered a delinquency or a crime by United States standards. The Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 2013, further amended the FJDA by lowering the minimum age from 16 to 15 years for prosecution of a juvenile as an adult, permitting trial of youths between the ages of 15 and 18 years as adults for felonies, *inter alia*, involving violence as defined in 18 U.S.C. 1 and 16. Having thoroughly reviewed the issue, the Department has decided it is necessary to adopt the basic position of the Board of Immigration Appeals in the above cited cases, with modifications to include subsequent amendments to the FJDA, pertaining to the age at which an individual could be prosecuted as an adult and to the description of the offense for which such an individual could be prosecuted. While the BIA decisions address convictions by foreign courts, the Department is of the view that the FJDA standard as to what conduct constitutes an act of juvenile delinquency should be applied to all conduct underlying all convictions, whether U.S. or foreign.

This rule is not considered to be a major rule for purposes of E.O. 12291 nor is it expected to have a significant impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Compliance with the provisions of the Administrative Procedure Act, 5 U.S.C. 553 relative to notice of proposed rulemaking and delayed effective date is impracticable and unnecessary in this instance because the amendments in this rule are necessary to bring Department regulations in compliance with United States standards on conduct constituting an act of juvenile delinquency as required by decisions of the Board of Immigration Appeals and amendments made by the Comprehensive Crime Control Act of

October 12, 1984, Pub. L. 98-473.

However, comments from the public have been solicited and will be given consideration prior to publication of the final rule.

#### List of Subjects in 22 CFR Parts 41 and 42

Visas, Aliens, Nonimmigrants, Immigrants, Ineligible classes.

In view of the foregoing, Parts 41 and 42 are amended to read as follows:

#### PART 41—VISAS: INELIGIBLE CLASSES OF NONIMMIGRANTS

1. The authority citation for Part 41 continues to read as follows:

Authority: Sec. 104, 66 Stat. 174, 8 U.S.C. 1104; sec. 109(b)(1), 91 Stat. 847.

2. Section 41.91(a)(9)(iii) is revised to read:

##### § 41.91 Aliens ineligible to receive visas.

(a) *Aliens ineligible under the provisions of section 212(a) of the Act.*

(9) *Crime involving moral turpitude.*

(iii) An alien shall not be ineligible to receive a visa under section 212(a)(9) of the Act by reason of any offense committed prior to the alien's fifteenth birthday. Nor shall an alien be ineligible to receive a visa under section 212(a)(9) of the Act by reason of any offense committed between the alien's fifteenth and eighteenth birthdays unless such alien was tried and convicted as an adult for a felony involving violence as defined in section 1(1) and section 16 of Title 18 of the United States Code. An alien tried and convicted as an adult for one of the foregoing violent felony offenses committed after having attained the age of fifteen years shall be subject to the provisions of section 212(a)(9) of the Act regardless of whether at that time juvenile courts existed within the jurisdiction of the conviction.

3. Section 41.91(a)(10)(i) is revised to read:

##### § 41.91 Aliens ineligible to receive visas.

(a) *Aliens ineligible under the provisions of section 212(a) of the Act.*

(10) *Conviction of two or more offenses.*

(i) An alien shall not be ineligible to receive a visa under section 212(a)(10) of the Act by reason of any offense committed prior to the alien's fifteenth birthday. Nor shall an alien be ineligible to receive a visa under section 212(a)(10) of the Act by reason of any offense

committed between the alien's fifteenth and eighteenth birthdays unless such alien was tried and convicted as an adult for a felony involving violence as defined in section 1(1) and section 16 of Title 18 of the United States Code. An alien, tried and convicted as an adult for one of the foregoing violent felony offenses committed after having attained the age of fifteen years and who has also been convicted of at least one other such offense or any other offense committed as an adult, shall be subject to the provisions of section 212(a)(10) of the act, regardless of whether at that time juvenile courts existed within the jurisdiction of the conviction.

#### PART 42—VISAS: INELIGIBLE CLASSES OF IMMIGRANTS

1. The authority citation for Part 42 continues to read as follows:

Authority: Sec. 104, 66 Stat. 174, 8 U.S.C. 1104; sec. 109(b)(1), 91 Stat. 847.

2. Section 42.91(a)(9)(iv) is revised to read:

##### § 42.91 Aliens ineligible to receive visas.

(a) *Aliens ineligible under the provisions of section 212(a) of the Act.*

(9) *Crime involving moral turpitude.*

(iv) An alien shall not be ineligible to receive a visa under section 212(a)(9) of the Act by reason of any offense committed prior to the alien's fifteenth birthday. Nor shall an alien be ineligible to receive a visa under section 212(a)(9) of the Act by reason of any offense committed between the alien's fifteenth and eighteenth birthdays unless such alien was tried and convicted as an adult for a felony involving violence as defined in section 1(1) and section 16 of Title 18 of the United States Code. An alien tried and convicted as an adult for one of the foregoing violent felony offenses committed after having attained the age of fifteen years shall be subject to the provisions of section 212(a)(9) of the Act regardless of whether at that time juvenile courts existed within the jurisdiction of the conviction.

3. Section 42.91(a)(10)(ii) is revised to read:

##### § 42.91 Aliens ineligible to receive visas.

(a) *Aliens ineligible under the provisions of section 212(a) of the Act.*

**(10) Conviction of two or more offenses. \* \* \***

(ii) An alien shall not be ineligible to receive a visa under section 212(a)(10) of the Act by reason of any offenses committed prior to the fifteenth birthday. Nor shall any alien be ineligible to receive a visa under section 212(a)(10) of the Act by reason of any offense committed between the alien's fifteenth and eighteenth birthday unless such alien was tried and convicted as an adult for a felony involving violence as defined in section 1(1) and section 16 of Title 18 of the United States Code. An alien, tried and convicted as an adult for one of the foregoing violent felony offenses committed after having attained the age of fifteen years, and who has also been convicted of at least one other such offense or any offense committed as an adult, shall be subject to the provisions of section 212(a)(10) of the Act, regardless of whether at that time juvenile courts existed within the jurisdiction of the conviction.

\* \* \*  
Dated: February 24, 1987.

Michael H. Newlin,

Acting Assistant Secretary for Consular Affairs.

[FR Doc. 87-10871 Filed 5-12-87; 8:45 am]

BILLING CODE 4710-06-M

**22 CFR Part 43**

[Department Regulation 108.859]

**Visas: Documentation of Immigrants**

**AGENCY:** Department of State.

**ACTION:** Final rule.

**SUMMARY:** This final rule establishes procedures for the implementation of the provisions of section 314 of the Immigration Reform and Control Act of 1986, Pub. L. 99-603. Those provisions were addressed in an Interim Rule published on January 14, 1987 (52 FR 1447-1451). This final rule adopts the procedures contained in the Interim Rule, with one clarifying amendment. The amendment modifies section 43.3(b) to make clear that "USPS Certified Mail" is a type of mail service excluded from being accepted for consideration.

Section 314 establishes a separate annual numerical limitation of 5,000 for FY 1987 and 1988. The total 10,000 immigrant visa numbers are not subject to the worldwide annual limitation of 270,000 under section 201 of the Immigration and Nationality Act and are made available to aliens entitled to compete for those numbers as nonpreference immigrants under the provisions of section 314. Entitlement to the numbers, which shall be made

available strictly in the chronological order in which the applicants qualify after the effective date of section 314, applies to aliens natives of foreign states whose immigration to the U.S. was adversely affected by the enactment of Pub. L. 89-236.

**EFFECTIVE DATE:** May 13, 1987.

**FOR FURTHER INFORMATION CONTACT:**

Cornelius D. Scully, Director, Office of Legislation, Regulations, and Advisory Assistance, Visa Office, Department of State, Washington, D.C. 20520 (202) 663-1184.

**SUPPLEMENTARY INFORMATION:** On January 14, 1987, the Department published at 52 FR 1447-51 an Interim Rule establishing Part 43 of Title 22, Code of Federal Regulations, to implement section 314 of Pub. L. 99-603, the Immigration Reform and Control Act of 1986.

**Comments Received**

Interested persons were given the opportunity to submit written comments on the interim rule on or before February 18, 1987. A total of three comments were received. They have carefully been reviewed and considered in the issuance of this final rule.

**Analysis of Comments**

All three commenters challenged, in one way or another, the Department's establishment of the registration procedures set forth in Part 43. One commenter asserted that the Department had no authority to promulgate any regulations whatsoever to implement section 314 since section 314 contains no express authorization to do so. (That same commenter, however, partially contradicted his overall assertion by conceding that the determination of which countries were "adversely affected" by Pub. L. 89-236 required regulations.) The overall assertion of lack of authority to promulgate regulations is, in any event, plainly inconsistent with existing law.

Section 104(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1104(a), provides, in pertinent part, as follows:

The Secretary of State shall be charged with the administration of the provisions of this Act and all other immigration and nationality laws relating to (1) the powers, duties and functions of diplomatic and consular officers of the United States, except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas; (2) the powers, duties and functions of the Bureau of Consular Affairs; . . . He shall establish such regulations, prescribe such forms of reports, entries and other papers; issue such instructions; and perform such other acts as

he deems necessary for carrying out such provisions . . ." (Italics supplied).

Clearly, section 314 of Pub. L. 99-603 is not a part of the Immigration and Nationality Act, as amended. It is rather a separate legislative enactment apart from, and supplementary to, the Immigration and Nationality Act. On the other hand, it is equally as clear that section 314 of Pub. L. 99-603 is an "immigration law" and, as such is within the purview of the portions of section 104(a) of the Immigration and Nationality Act quoted and italicized above. Accordingly, the Secretary (and, by delegation of authority, the Assistant Secretary for Consular Affairs) has statutory authority to promulgate reasonable regulations, and to take other reasonable actions necessary to implement section 314. This conclusion was sustained by the United States District Court for the Central District of California on March 23, 1987, in the case of *Fakheri-Rad v. Shultz*, No. Cv. 87-393-IH.

In addition, Congress contemplated the need for implementing regulations. In the Conference Report on Pub. L. 99-603 (House Report 99-1000, October 14, 1986) at p. 98 it is stated that "(t)he Conferees direct the Secretary of State to establish an orderly mechanism for the distribution of visas under this provision."

All three commenters also asserted that the Department had a duty to implement section 314 immediately upon enactment under the existing immigrant visa regulations contained in Part 42 of Title 22, Code of Federal Regulations. Two of the three commenters supported this assertion by reference to initial instructions from the Department to consular offices abroad relative to section 314.

With respect to the possible applicability of the general immigrants visa regulations set forth in Part 42 of Title 22, it should be noted that those regulations are styled "Documentation of Immigrants Under the Immigration and Nationality Act, As Amended." As such, they are not automatically applicable to the documentation of immigrants under any other immigration law, except to the extent that such law specifies they are, or the Department makes them applicable by regulation. The commenters directed their comments particularly to those provisions of Part 42 relating to the chronological order of processing of preference and nonpreference immigrants, the establishment of preference and nonpreference priority dates and the establishment of waiting lists—22 CFR 42.61, 42.62 and 42.100.

It is precisely these provisions which cannot be applied to aliens applying for visas under section 314. As explained in the Supplementary Information set forth in the Interim Rule, for more than twenty years the immigrant visa processing system has been based upon section 212(a)(14) of the Act. All intending immigrants have had to take some affirmative step in order to qualify to compete for immigration to the United States. The pre-1965 system under which the mere submission of a letter expressing intent to immigrate sufficed to register an alien as a nonpreference immigrant and the date of receipt of the letter established the alien's nonpreference priority date was rendered obsolete by the 1965 amendments (Pub. L. 89-236) and the regulations concerning it were replaced by the current regulations. The Congress nullified this system as to applicants for visas under section 314 by providing in section 314(c) that section 212(a)(14) shall not apply in determining an alien's eligibility for a visa under that section. In effect, the Congress restored the pre-1965 situation as to such applicants, making it imperative that regulations be promulgated to provide an alternative system for qualifying to compete for immigration under section 314 and for determining the chronological order of competition. Because of the apparent intent of the Congress to allow these applicants to qualify on the pre-1965 basis, the Department modeled its implementing regulations concerning the method of registration and the determination of chronological order on the pre-1965 visa regulations which were contained at that time in 22 CFR 42.64.

Regulations were also clearly required to establish both a mechanism for determining which foreign states are "foreign states the immigration of whose natives to the United States was adversely affected by enactment of Pub. L. 89-236" and for making the authorized visa numbers available "first" to natives of such foreign states. The concept of distinguishing among foreign states on such a basis is altogether outside the contemplation of the Immigration and Nationality Act. The provision for making the authorized immigrant visa numbers available first to natives of specified foreign states as opposed to others is plainly inconsistent with the general provisions of section 203 (a) (7) of the Act and its implementing regulations.

These considerations led the Department to conclude that regulations would be required to implement the provisions of section 314. The decision to promulgate the implementing

regulations as a separate Part 43 of Title 22 was based on an examination of prior precedent. There have been occasions in the past when the Congress has enacted immigration law which operated alongside the Immigration and Nationality Act. When such enactments established requirements and/or procedures different from those in the Act or in addition thereto, the Department promulgated implementing regulations as a separate part within Title 22. The most notable example of this practice is found in Part 44 of Title 22 which was published on December 3, 1953, at 18 FR 7783 in implementation of the provisions of the Refugee Relief Act of 1953, Pub. L. 203, 83rd Congress, the Act of August 7, 1953. The Refugee Relief Act of 1953 provided for the issuance of 205,000 special nonquota immigrant visas to certain defined classes of aliens. It was limited in time, having an expiration date of December 31, 1956. It was closely related to the Immigration and Nationality Act in that it incorporated by reference all provisions of the Immigration and Nationality Act except as specifically otherwise provided.

Considering the Refugee Relief Act of 1953 to be a useful and pertinent precedent, the Department decided to follow it in promulgating its regulations in implementation of section 314 as a new Part 43. This has the virtue of perpetuating in regulation the clear Congressional distinctions between aliens applying for visas under section 314 and those applying for visas under the Immigration and Nationality Act. It will also simplify the process of revoking the implementing regulations upon the expiration of section 314.

As noted, all of the commenters asserted that the Department had a duty to implement section 314 immediately upon enactment of Pub. L. 99-603—i.e., beginning on November 7, 1986, the day following signature by the President. Their assertion is presumably based upon their incorrect belief that the provisions of 22 CFR 42.61, 42.62 and 42.100 apply to the implementation of section 314. It is true that, as a preliminary stage, the Department initially considered that it might be possible to implement section 314 immediately upon enactment by publishing the necessary regulations as a Final Rule on an urgent basis and without notice and comment of any kind. An initial telegram to all diplomatic and consular offices alerting them to the existence of section 314 indicated as much. The responses to that initial telegram, all received well before the date of enactment, made it

clear, however, that this would not be possible. A number of the responses reflected serious concerns and raised troubling questions. One Embassy reported, for example, that garbled reports about section 314 were already circulating in the local community, that it had been receiving up to 3,500 inquiries a day, and that local police authorities were concerned about crowd control around the Embassy premises. Another Embassy warned that a recent report about opportunities for emigration to a third country had led to riots in the city which lasted for three days and were broken up only by gunfire from local security forces. Other embassies and consulates reported the likelihood of administrative chaos in handling a sudden surge of mail and walk-in applications and a number voiced the fear that such chaotic conditions would heighten the possibility of fraudulent manipulation of the registration system.

Thus, even before the date of enactment it had become clear to the Department that extremely careful study, analysis, and planning would be critical in order to establish an application and registration system which was equitable, consistent with the provisions of section 314 and administratively feasible. Accordingly, all diplomatic and consular offices were instructed, prior to the date of enactment, that implementation would be delayed until these issues had been resolved and that no registrations were to be accepted until further instructed. The months of November and December were devoted to the required study, analysis and planning. On January 5, 1987, the details of the system decided upon were announced publicly. On January 14, 1987, the Interim Rule establishing the system was published in the *Federal Register* and the registration period was January 21 to January 27, 1987.

It is the Department's position that the delay in implementation described above was lawful, necessary and reasonable, given the complex nature of the issues which had to be resolved. In this connection, it is of interest to note that the regulations implementing the Refugee Relief Act of 1953 were not promulgated until four months after enactment.

One commenter asserted that the provisions in 22 CFR 43.4(b) establishing a limitation on the amount of immigrant numbers which can be made available to natives of any affected foreign state is not justified by the provisions of section 314. It is true that no such limitation is expressly provided for in section 314.

Nevertheless, the Department believes that it is consistent with the intent of the Congress that such legislation be imposed. Under the overall annual limitation of 270,000 on immigration in section 201(a) of the Immigration and Nationality Act there is a foreign state limitation of 20,000 which clearly was included by the Congress to prevent preemption of the entire litigation by natives of one or a few foreign states. The Department considered it to be reasonable to apply the same principle to the limitation established by section 314.

In this case, however, the Department believed it appropriate to establish a variable limitation based on the extent to which average annual immigration declined from the pre-1965 period to the post-1965 period for each foreign state. The variable limitation merely refines the basic principle of avoiding preemption by ensuring that natives of foreign states only marginally affected could not receive a disproportionately high percentage of the visas authorized under section 314 at the expense of natives of foreign states far more significantly affected. In any event, the issue of the appropriateness of this provision has become moot, as an operational reality. As will be apparent from the information set forth below, there is no case in which the number of registrants within the first 10,000 from any single foreign state or area exceeds the limitation for that foreign state or area.

One commenter asserted that the Department failed to comply with the provisions of the Administrative Procedure Act, 5 USC 553, presumably for failure to publish Notice of Proposed Rulemaking. The Department believes that it has adequate justification for publishing an Interim Rule and that such justification is adequately set forth in the Supplementary Information contained in the Interim Rule. See *Fakheri-Rad v. Shultz*, *supra*.

The same commenter complained that the Department had failed to publish or otherwise provide access for the public to the statistical data relied upon in determining adversely affected countries. As explained in 22 CFR 43.2, the statistical information was taken from the publicly available Annual Statistical Yearbooks of the Immigration and Naturalization Service for the years in question and from publicly available compilations of such data prepared by INS.

The same commenter also questioned the use of July 1, 1953, as the beginning of the pre-1965 measuring period as the formula for determining adversely affected foreign states, contending that

it failed to take into account the fact that prior to 1946 all citizens of the Philippines were citizens of the United States. There is no authority for the statement that, prior to 1946 all citizens of the Philippines were citizens of the United States, as is reflected in all of the pertinent statutes—the Act of July 1, 1902, the Act of March 23, 1912, the Act of August 29, 1916, and the Act of May 24, 1934. The Department fails to perceive the import of the assertion, even if it were true.

The Department chose July 1, 1953, as the beginning of the measuring period because it marks the beginning of the first full fiscal year in which the Immigration and Nationality Act was effective. The Department considered it appropriate to restrict consideration to the period covered by the Immigration and Nationality Act since (1) Pub. L. 89-236 was an amendment to the Immigration and Nationality Act not to any prior acts; and (2) prior legislation (the Immigration Act of 1924 and the Act of February 5, 1917), though similar was sufficiently different to warrant confining the period of consideration to that to which the Immigration and Nationality Act applied.

The same commenter asserts that the interpretation of section 314 also ignores United States treaty obligations not to discriminate against natives of various foreign nations, citing as an example the Treaty of Amity, Economic Relations and Consular Rights with Iran, June 27, 1957. The commenter does not, however, specify in what way and for what reason this is so, and it is hard to see how such agreements could have anything to do with section 314. *Cf.*, *Sumitomo Shoji America, Inc. v. Avagliano* 467 U.S. 176 (1982). As the Department has been unable to hypothesize a colorable argument in support of the assertion, it is unable to comment further upon the assertion.

The same commenter challenges the exclusion of Hong Kong from the list of adversely affected countries as being contrary to the definition of "foreign state" contained in section 101(a)(13) of the Immigration and Nationality Act. The Department believes that it had unambiguous Congressional authority to promulgate a definition of "foreign state" for the purposes of section 314, since the cited section of the Immigration and Nationality Act is, by its express terms, applicable only to the Immigration and Nationality Act and since the definition adopted is an appropriate one for the reasons set forth in the Interim Rule.

The same commenter alleged that the Department failed to consider the effects of Pub. L. 89-236 on independent

countries of the Western Hemisphere. This allegation is untrue. As is expressly stated in the Interim Rule, the Department used annual total admissions of immigrants, as opposed to numerically limited admissions only, for the express purpose of being able to consider the possible adverse effects of Pub. L. 89-236 on immigration by natives of all countries. In fact, two independent countries of the Western Hemisphere—Argentina and Canada—were determined to have been adversely affected. For the others, the annual average rate of immigration was at least as high after enactment of Pub. L. 89-236 as it had been prior thereto.

The same commenter criticized the Department's decision to allow only applicants from adversely affected foreign states to register. As noted in the Interim Rule, the Department recognizes that section 314 contemplates that natives of all foreign states may compete for the authorized immigrant visa numbers. Section 314 also requires, however, that the authorized immigrant visa numbers be made available "first" to natives of adversely affected foreign states. The information available to the Department from the outset regarding the extent of worldwide interest in section 314 made it obvious that natives of adversely affected foreign states would register in such numbers that none of the authorized visa numbers could ever be made available to other aspiring applicants. Facing that certainty, the Department concluded that permitting applicants from non-adversely affected countries to register would both create an administrative nightmare and inevitably raise unwarranted expectations among those who had absolutely no chance of success.

Events have fully borne out the Department's expectations. The Department received over 1.5 million pieces of mail in response to the registration system announced on January 5 and set forth in the Interim Rule. Nearly one million pieces of mail were received during the one-week registration period. Had the Department permitted registration by natives of all foreign states there would undoubtedly have been many millions—perhaps tens of millions—more from applicants for whom no immigrant visa numbers will ever be available under section 314.

The same commenter asserted that the registration procedure was unfair, both inherently and because it was selectively advertised abroad. The Department made every reasonable effort to publicize the program both in the United States and abroad.

Recognizing that, while publication in the **Federal Register** constitutes public notice as a matter of law, very few persons outside the United States have ever even heard of the **Federal Register**, much less ever seen a copy, the Department prepared a public announcement which was sent to all diplomatic and consular offices with instructions to make it public on January 5, 1987, and to give it as much distribution as was possible. As far as the Department is aware, all posts abroad complied with those instructions in good faith to the best of their ability. The Department also made a public announcement on that same day through its Press Office. The United States Information Agency (USIA) carried the public announcement on its international wireless file which is made available for use throughout the world by the media. Also, the Voice of America (VOA) broadcast information about the registration system.

The commenter's claim of inherent unfairness is based on the proposition that the mail-in registration system favored those who were wealthy enough to pay the postage for multiple applications, or to have a representative see to the mailing for them. The Department is aware that visa applicants do hire lawyers or other representatives to assist them in taking the steps necessary to qualify for and receive a visa to enter the United States. The Department neither approves nor disapproves of this practice and neither encourages it nor discourages it. Rather, the Department simply recognizes it as a fact and a matter to be decided by the individual visa applicant. It is sometimes said that the requirements under the general immigration law are so complex as to virtually force applicants to do so. While the Department does not propose to participate in any discussion of this issue generally, it does not believe that a registration procedure which consists of writing a letter identifying oneself, as is provided for in the Interim Rule, can fairly be subjected to that criticism.

The same commenter suggested that the Department conduct a drawing to pick 30,000 applications from among all those received and that those somehow be chronologicalized to form the waiting list. The Department did consider a procedure of this kind but concluded that the procedure adopted was more consistent with the requirement of section 314 that the authorized visa numbers be made available "strictly in the chronological order" in which the applicants qualified.

Finally, the same commenter impugned the motives of the proponents of section 314 and questioned the propriety of the legislative procedures which resulted in its enactment. The Department was not privy to the actions and deliberations which led to the enactment of section 314 and they are not germane to the issues at hand here.

Having discussed the comments received concerning the Interim Rule, the Department wishes to take the occasion also to make public certain information concerning the NP-5 program and to explain certain aspects of its operation.

First, the Department wishes to explain the mechanics of establishing the chronological order of receipt of individual pieces of mail. Mail received at the post box address during the application period was sorted by United States Postal Service employees and placed in containers of 500 pieces each. Each group of such containers was loaded onto a carrying rack and the carrying rack was delivered to representatives of the Visa Office and of the firm contracted to carry out the processing of the mail. It is the Department's understanding that this is a standard procedure followed by USPS in delivering incoming mail to the person or organization which has rented a post office box where the volume of mail is heavy.

Each carrying rack was labelled to indicate the order of its receipt from USPS. The racks were then transported to the office space of the contractor where they were kept under lock and key until ready for processing, the key being at all times in the possession of an officer of the Visa Office.

Employees of the contractor opened the mail, tray-by-tray, working each loading rack in the chronological order of its receipt from USPS and working each tray from a loading rack in the order it was loaded onto the rack. Other employees of the contractor then entered the information furnished by the applicants into a computer programmed for this purpose.

The computer was programmed to create a twelve digit number—the date/time group—consisting of the year, month, day, hour, minute and second of the data entry. The date/time group constitutes the registration date—and, therefore, the priority date—for future consideration of the application under section 314 and the implementing regulations.

Second, the Department wishes to emphasize that neither an early registration date nor even the scheduling of an appointment for final action (visa

issuance or refusal) constitutes a guarantee that the applicant will receive a visa under section 314. Following the data entry procedure described above, the Department mailed computer printouts of the information to the immigrant visa issuing office designated by the applicant. Upon receipt of the printouts, the immigrant visa issuing offices initiated the standard immigrant visa processing procedures. The first 10,000 registrants have been informed that they may proceed with the normal administrative processing leading to the scheduling of an appointment for final action (visa issuance or refusal). The next 15,000 registrants are being informed that they are registered, but that visa numbers are not available for their use at this time.

Once the allocation of immigrant visa numbers commences, visa numbers will be allocated within the limits established by law and regulation to those among the first 10,000 registrants who have completed the administrative processing. If at some point it should appear that Packet 3 should be sent to some of the second group who initially received Packet 3A, in order to ensure that all of the authorized visa numbers are used in each fiscal year, that will be done.

In summary, as is provided both in section 314 itself and in the implementing regulations, all rules, requirements and procedures applicable to immigrant visa processing, issuance and refusal generally (except that section 212(a)(14)—the labor certification requirement—does not apply) will apply to the processing, issuance and refusal of visas under section 314. Under those generally applicable rules, requirements and procedures, no alien is guaranteed, or can expect to be guaranteed, a visa until the consular officer has determined that he or she is eligible in all respects to receive a visa.

Third, the Department wishes to point out that the provisions in 22 CFR 43.3(b) excluding from consideration hand-delivered applications, telegrams and certain forms of mail service requiring a return receipt of some kind includes USPS Certified Mail. 22 CFR 43.3(b) is being amended to clarify this point.

Fourth, it came to the Department's attention in processing the registration of applications that certain of the registrants were children under the age of 16 apparently unaccompanied by their parents. Those applications have been processed for registration just as the others but it will probably not be possible to issue immigrant visas to such registrants, because of section 203(a)(7)

of the Immigration and Nationality Act which provides, in pertinent part, that:

No immigrant visa shall be issued under this paragraph to an adopted child or prospective adopted child of a United States citizen or lawfully resident alien unless (A) a valid home study has been favorably recommended by an agency of the State of the child's proposed residence, or by an agency authorized by that State to conduct such a study or, in the case of a child adopted abroad, by an appropriate public or private adoption agency which is based in the United States; and (B) the child has been irrevocably released for immigration and adoption: Provided, that no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege or status under this Act. No immigrant visa shall otherwise be issued under this paragraph to an unmarried child under the age of sixteen except a child who is accompanying or following to join his natural parent.

Any registrant who is a minor child will be subject to this provision.

Fifth, the Department wishes to inform the public that it does not have the capability of responding to inquiries concerning the status of applications for registration under section 314. The names and other identifying data of the first 25,000 registrants have been sent to the immigrant visa issuing office designated by the registrant. Those offices are preparing the standard immigrant visa control card and mailing appropriate instructions to the registrant at the mailing address listed by the registrant. All other pieces of mail received at the post office box address are being retained pending a decision as to their ultimate disposition but it is not administratively feasible to search through the nearly 1.5 million pieces of mail for individual envelopes.

Sixth, the Department will not be able to return applications to the applicants. All applications for registration will be retained for an appropriate period of time pending destruction.

Seventh, the Department has communicated with the Immigration and Naturalization Service concerning the possibility that a successful NP-5 registrant who is in the United States may apply for adjustment of status to permanent resident under section 245 of the Immigration and Nationality Act, as amended. It is the Service's position that an NP-5 registrant who is in the United States may apply for adjustment of status on the same basis as any other alien in the United States. The alien must have been inspected and admitted or paroled and must not be within the prohibitions of section 245(c). In addition, an immigrant visa must be immediately available to the alien when the application is filed.

The visa availability requirement merits further explanation as it relates to NP-5 applicants. As is true for immigrant visa applicants generally, the Packet 3 or 3A letter sent to NP-5 registrants shows the registrant's priority date. INS procedure in determining visa availability for an adjustment of status applicant is to compare the applicant's priority date with the visa issuance cut-off date under the applicable classification as shown in the current month's Visa Office Bulletin on visa availability.

The Department has recently made the initial allocation of NP-5 immigrant visa numbers and has established a visa issuance cut-off date for NP-5 applicants which is being made public in the standard manner—i.e., it is being included in the next monthly Visa Office Bulletin on immigrant visa availability and is being included in the information given on the visa availability recording on the Visa Office's dedicated telephone line, (202) 663-1514. Accordingly, NP-5 applicants in the United States who meet all the generally applicable requirements for adjustment of status may apply to the appropriate District Office of the Immigration and Naturalization Service.

Eighth, the Department believes that the results of the registration period will be of interest. Roughly 400,000 pieces of mail were received prior to 12:01 a.m., January 21, 1987. These pieces of mail have been retained but, as provided in 22 CFR 43.3(a), have not been processed or given consideration under the NP-5 program. From 12:01 a.m., January 21, through midnight, January 27, the designated registration period, about 950,000 pieces of mail were received. These pieces of mail have been handled as previously described. Almost 125,000 pieces of mail have been received since the close of the registration period. These latter pieces of mail are also being temporarily retained but are not being processed or given consideration under the NP-5 program. The department intends to destroy all of the mail relating to the NP-5 program after a reasonable time as determined by the Department. But in any event no earlier than six months from the effective date of this final rule.

As has been previously described, the names and identifying information of the first 25,000 registrants have been sent to the visa issuing office designated by them. Those offices are preparing the standard immigrant visa control card and sending Packet 3 to the first 10,000 and Packet 3A to the next 15,000.

The distribution of the first 10,000 registrants by foreign state or area is as follows:

Albania.....	0
Algeria.....	15
Argentina.....	170
Austria.....	82
Belgium.....	63
Bermuda.....	6
Canada.....	2,078
Czechoslovakia.....	27
Denmark.....	54
Estonia.....	7
Finland.....	39
France.....	201
German Democratic Republic.....	20
Federal Republic of Germany.....	311
Gibraltar.....	1
Great Britain.....	1,181
Guadeloupe.....	0
Hungary.....	32
Iceland.....	4
Indonesia.....	810
Ireland.....	3,112
Italy.....	315
Japan.....	518
Latvia.....	1
Liechtenstein.....	0
Lithuania.....	3
Luxembourg.....	0
Monaco.....	0
New Caledonia.....	0
Netherlands.....	108
Norway.....	9
Poland.....	592
San Marino.....	0
Sweden.....	129
Switzerland.....	96
Tunisia.....	16
Total.....	10,000

Finally, the Department believes that some NP-5 registrants were already registered for immigration under one of the classifications in section 203(a) of the Immigration and Nationality Act. The Department believes it to be important that, since there is no guarantee that any NP-5 registrant will receive a visa, those who also have another entitlement do nothing to prejudice that other entitlement.

This rule is not considered to be a major rule for purposes of E.O. 12291 nor is it expected to have a significant impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 22 CFR Part 43

Aliens, Nonpreference immigrants, Visas.

#### PART 43—[AMENDED]

Accordingly, the interim rule (22 CFR Part 34) published at 52 FR 1447 is adopted as a final rule with the following amendment:

1. The authority citation for Part 43 continues to read:

Authority: Sec. 104, 66 Stat. 174, 8 U.S.C. 1104; sec. 109(b)(1), 91 Stat. 847. Also sec. 314, 100 Stat. 3359, 3439, 8 U.S.C. 1153 Note.

2. Section 43.3(b) is amended by the addition of "USPS Certified Mail" in the second sentence, as follows:

**§ 43.3 Registration of applicants and priority date.**

(b) *Place of registration.* \* \* \* Hand-delivered applications, telegrams, envelopes sent by registered mail, Federal Express, USPS Certified Mail or other courier services will not be accepted. \* \* \*

Dated: April 16, 1987.

Joan M. Clark,

*Assistant Secretary for Consular Affairs.*

[FR Doc. 87-10870 Filed 5-12-87; 8:45 am]

BILLING CODE 4710-06-M

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**Office of the Secretary**

**24 CFR Parts 243, 511, 842 and 942**

[Docket No. R-87-1152; FR-1936]

**Pet Ownership in Assisted Housing for Elderly or Handicapped; Correction**

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Final rule; correction.

**SUMMARY:** This document corrects a final rule that appeared in the *Federal Register* on Monday, December 1, 1986 (51 FR 43207). It corrects the citation to the statutory authority for the rule in the rule text.

**FOR FURTHER INFORMATION CONTACT:**

Grady J. Norris, Assistant General Counsel for Regulations, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20401. Telephone (202) 755-7055. (This is not a toll-free number.)

Accordingly, the Department is correcting FR Document 86-25747, published December 1, 1986 (51 FR 43270) as follows:

**PART 243—[CORRECTED]**

1. In the authority citation for Part 243 on page 43296, the citation to 12 U.S.C. 1701n-1 is corrected to read 12 U.S.C. 1701r-1.

**§ 243.1 [Corrected]**

2. In § 243.1(a) on page 43296, the citation to 12 U.S.C. 1701n-1 is corrected to read 12 U.S.C. 1701r-1.

**PART 842—[CORRECTED]**

3. In the authority citation for Part 842 on page 43302, the citation to 12 U.S.C.

1701n-1 is corrected to read 12 U.S.C. 1701r-1.

**§ 842.1 [Corrected]**

4. In § 842.1(a) on page 43302, the citation to 12 U.S.C. 1701n-1 is corrected to read 12 U.S.C. 1701r-1.

**PART 942—[CORRECTED]**

5. In the authority citation for Part 942 on page 43302, the citation to 12 U.S.C. 1701n-1 is corrected to read 12 U.S.C. 1701r-1.

**§ 942.1 [Corrected]**

6. In § 942.1(a) on page 43302, the citation to 12 U.S.C. 1701n-1 is corrected to read 12 U.S.C. 1701r-1.

Dated: May 8, 1987.

Grady J. Norris,

*Associate General Counsel for Regulations.*

[FR Doc. 87-10964 Filed 5-12-87; 8:45 am]

BILLING CODE 4210-32-M

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Part 301**

[T.D. 8139]

**Procedure and Administration; Reduction of Tax Overpayments by Amount of Past-due Legally Enforceable Debt Owed to Federal Agency**

**AGENCY:** Internal Revenue Service, Treasury.

**ACTION:** Temporary regulations.

**SUMMARY:** This document contains temporary regulations which amend temporary regulations which were published in the *Federal Register* September 30, 1985 relating to the reduction of a taxpayer's overpayment (i.e., tax refund) by the amount of any past-due legally enforceable debt owed to a Federal agency and referred by that agency to the Internal Revenue Service for offset. The text of the temporary regulations set forth in this document also serves as the text of the proposed regulations cross-referenced in the notice of proposed rulemaking in the Proposed Rules section of this issue of the *Federal Register*. Changes to the applicable law were made by the Spending Reduction Act of 1984. The regulations affect any taxpayer who owes a past-due legally enforceable debt to any Federal agency identified as eligible to participate in the tax refund offset program by the Commissioner of Internal Revenue and who has made an overpayment of taxes, and such Federal

agency to which the past-due legally enforceable debt is owed.

**EFFECTIVE DATES:** The regulations apply to refunds payable under section 6402 of the Internal Revenue Code of 1954 after December 31, 1985 and before January 1, 1988 and are effective May 13, 1987.

**FOR FURTHER INFORMATION CONTACT:**

Sharon L. Hall of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, Attention: CC:LR:T, 202-566-3288 (not a toll-free call).

**SUPPLEMENTARY INFORMATION:**

**Background**

On September 30, 1985, temporary regulations under section 6402 (d) and (e) of the Internal Revenue Code of 1954, and section 3720A of Subchapter II of Chapter 37 of Title 31, United States Code were published in the *Federal Register* (50 FR 39713, Sept. 30, 1985). This document amends those temporary regulations, which provided guidance concerning which debts qualify for referral to the Service for the Federal tax refund offset program and concerning procedures relating to operation of the program.

**In General**

Section 6402(d) of the Internal Revenue Code requires the Internal Revenue Service (1) to reduce the amount of any overpayment (i.e., tax refund) otherwise payable to a taxpayer by the amount of any past-due legally enforceable debt owed to a Federal agency of which the Service has been notified, (2) to pay the amount of the reduction to the agency to which the debt is owed, and (3) to notify the taxpayer that the overpayment has been reduced.

The temporary regulations require that prior to referral of a debt to the Service, an agency notify, or make a reasonable attempt to notify the debtor that the debt is past due and that unless repaid, it will be referred to the Service. The temporary regulations are amended to clarify that a reasonable attempt to notify the debtor must include using address information obtained from the Service pursuant to section 6103(m)(2) or 6103(m)(4). The temporary regulations require the Federal agency to give the debtor at least 60 days to present evidence that all or part of the debt is not past-due or legally enforceable, consider any evidence presented, and determine that the debt is past-due and legally enforceable. These amendments to the regulations provide that the Federal agency itself must receive and

consider any evidence presented by the debtor. Evidence presented to or considered by any organization, governmental entity or person acting on the Federal agency's behalf does not satisfy this requirement, unless the debtor is accorded at least 30 days from the date of a determination by the entity or person acting on the Federal agency's behalf that the debt is past-due or legally enforceable to request review by an officer or employee of the Federal agency of any unresolved dispute and the Federal agency directly notifies the debtor of the agency's final determination.

The temporary regulations require debts to be offset after June 30, 1986, to be referred to a consumer reporting agency under 31 U.S.C. 3711(f). The temporary regulations are amended to waive the requirement that a debt be referred to a consumer reporting agency if the consumer reporting agency would be prohibited from making a consumer report regarding the debt under 15 U.S.C. 1681c or if the amount of the debt does not exceed \$100.

These amendments to the regulations contain an additional requirement that agencies referring debts to the Service for offset after June 30, 1986, have regulations governing the Federal tax refund offset program, regulations governing administrative offset under 31 U.S.C. 3716 and regulations governing salary offset under 5 U.S.C. 5514(a) (unless the agency has certified that it will not refer to the Service any names of present or former Federal employees or other persons whose debts are subject to offset under the provisions of 5 U.S.C. 5514(a)(1)).

#### Executive Order 12291 and Regulatory Flexibility Act

The Commissioner of Internal Revenue has determined that this temporary rule is not a major rule as defined in Executive Order 12291 and, therefore, a Regulatory Impact Analysis is not required. A general notice of proposed rulemaking is not required by 5 U.S.C. 553 for temporary regulations. Accordingly, these temporary regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

#### Drafting Information

The principal author of these regulations is Sharon L. Hall of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing

the regulations on matters of both substance and style.

#### List of Subjects in 26 CFR Part 301

Administrative practice and procedure, Bankruptcy, Courts, Crime, Employment taxes, Estate taxes, Gift taxes, Income taxes, Investigations, Law enforcement, Penalties, Pensions, Statistics, Taxes, Disclosure of information, Filing requirements.

#### Amendments to the Regulations

The amendments to 26 CFR Part 301 are as follows:

#### PART 301—[AMENDED]

**Paragraph 1.** The authority for Part 301 continues to read as follows:

**Authority:** 26 U.S.C. 7805. \* \* \* Section 301.6402-6T also issued under 31 U.S.C. 3720A.

**Par. 2.** Section 301.6402-6T (b) is revised to read as follows:

#### § 301.6402-6T Offset of past-due legally enforceable debt against overpayment (temporary).

\* \* \* \* \*

(b) Past-due legally enforceable debt eligible for refund offset. For purposes of this section, a past-due legally enforceable debt which may be referred by a Federal agency to the Service for offset is a debt—

(1) Which, in the case of a debt to be referred to the Service after June 30, 1986, is owed to an agency that has promulgated temporary or final regulations under 31 U.S.C. 3720A, governing the operation of the Federal tax refund offset program in such agency; has promulgated temporary or final regulations under 31 U.S.C. 3716, governing the operation of the administrative offset program in such agency; and has promulgated temporary or final regulations under 5 U.S.C. 5514 (a), governing the operation of the salary offset program in such agency (unless the agency has certified that it will not refer to the Service any names of present or former Federal employees or other persons whose debts are subject to offset under the provisions of 5 U.S.C. 5514 (a) (1));

(2) Which, except in the case of a judgment debt, has been delinquent for at least three months but has not been delinquent for more than ten years at the time the offset is made;

(3) Which cannot be currently collected pursuant to the salary offset provisions of 5 U.S.C. 5514 (a) (1);

(4) Which is ineligible for administrative offset under 31 U.S.C. 3716 (a) by reason of 31 U.S.C. 3716 (c) (2), or cannot be currently collected by

administrative offset under 31 U.S.C. 3716 (a) by the referring agency against amounts payable to the debtor by the referring agency;

(5) With respect to which the agency has given the taxpayer at least 60 days to present evidence that all or part of the debt is not past-due or legally enforceable, has considered evidence presented by such taxpayer, and determined that an amount of such debt is past-due and legally enforceable;

(6) Which, in the case of a debt to be referred to the Service after June 30, 1986, has been disclosed by such agency to a consumer reporting agency as authorized by 31 U.S.C. 3711 (f), unless the consumer reporting agency would be prohibited from reporting information concerning the debt by reason of 15 U.S.C. 1681c, or unless amount of the debt does not exceed \$100;

(7) With respect to which that the agency has notified, or has made a reasonable attempt to notify, the taxpayer that the debt is past due, and unless repaid within 60 days thereafter, will be referred to the Service for offset against any overpayment of tax; and

(8) Which is at least \$25.

For purposes of this paragraph, in order to make a reasonable attempt to notify the taxpayer the agency must use such address information as may be obtainable from the Service pursuant to section 6103 (m) (2) or (4) of the Code. Further, in the case of a debt to be referred to the Service after June 30, 1986, the taxpayer's evidence that the debt is not past-due or legally enforceable must be presented directly to and be considered directly by the Federal agency to which the debt is owed and not to other entities or persons acting on the Federal agency's behalf, unless the debtor is accorded at least 30 days from the date of a determination by the entity or person acting on the Federal agency's behalf that the debt is past-due or legally enforceable to request review by an officer or employee of the Federal agency of any unresolved dispute as to whether all or part of the debt is past-due or legally enforceable and the Federal agency directly notifies the debtor of the agency's final determination.

\* \* \* \* \*

There is need for immediate guidance with respect to the provisions contained in this Treasury decision. For this reason, it is found impractical to issue this Treasury decision with notice and public procedure under subsection (b) of section 553 of Title 5 of the United States Code or subject to the effective

date limitation of subsection (d) of that section.

Lawrence B. Gibbs,  
Commissioner of Internal Revenue.

Approved: April 30, 1987.

J. Roger Mentz,

Assistant Secretary of the Treasury.

[FR Doc. 87-10917 Filed 5-12-87; 8:45 am]

BILLING CODE 4830-01-M

## DEPARTMENT OF JUSTICE

### Office of the Attorney General

#### 28 CFR Part 0

[Order No. 1186-87]

#### Delegation of Authority to the Director, Bureau of Prisons

AGENCY: Department of Justice.

ACTION: Final rule.

**SUMMARY:** Public Law 99-646, Criminal Law and Procedure Technical Amendments Act of 1986, provided the Attorney General with two specific authorities that are now being re-delegated to the Director, Bureau of Prisons. The first delegation will allow the Director, Bureau of Prisons to accept donations on behalf of the Bureau of Prisons, including Federal Prison Industries, under 18 U.S.C. 4044. The second delegation authorizes the Director, Bureau of Prisons to make available to the head of any law enforcement agency of a state or of a unit of local government information with respect to federal prisoners who have been convicted of felony offenses against the United States and who are confined at a facility which is a residential community treatment center located in the geographical area in which the requesting agency has jurisdiction. This authority presently resides with the Attorney General under 18 U.S.C. 4082(f). These re-delegations of authority are expected to allow for a more efficient and direct handling of these matters.

**EFFECTIVE DATE:** April 24, 1987.

**FOR FURTHER INFORMATION CONTACT:** Hank Jacob, Office of General Counsel, Bureau of Prisons, phone 202/272-6874.

**SUPPLEMENTARY INFORMATION:** This Order pertains to agency management. It is not subject to publication for notice and comment under 5 U.S.C. 553 and is not a rule within the meaning of either the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., or Executive Order No. 12291 ("Federal Regulation").

## List of Subjects in 28 CFR Part 0

Authority delegation (Government agencies), Organization and functions (Government agencies).

Accordingly, by virtue of the authority vested in me by 28 U.S.C. 510 and 5 U.S.C. 301, 0.96 of Title 28, Code of Federal Regulations is amended as follows:

### PART 0—[AMENDED]

1. The authority citation for Part 0 is revised to read as follows:

Authority: 5 U.S.C. 301, 2303; 8 U.S.C. 1103, 1427(g); 15 U.S.C. 644(k); 18 U.S.C. 2254, 4001, 4041, 4042, 4044, 4082, 4201 et seq., 6003(b); 21 U.S.C. 871, 881(d), 904; 22 U.S.C. 263a, 1621-1645o, 1622 note; 28 U.S.C. 509, 510, 515, 524, 542, 543, 552, 552a, 569; 31 U.S.C. 1108; 50 U.S.C. App. 2001-2017p; Pub. L. No. 91-513, sec. 501; EO 11919; EO 11267; EO 11300.

2. In § 0.96, paragraphs (t) and (u) are added to read as follows:

#### § 0.96 [Amended]

(t) Authority to accept donations on behalf of the Bureau of Prisons, including Federal Prison Industries, and to promulgate rules concerning these donations, in accordance with the provisions of section 4044 of Title 18 of the United States Code.

(u) Authority under the provisions of 18 U.S.C. 4082(f) to provide law enforcement representatives with information on federal prisoners who have been convicted of felony offenses and who are confined at a residential community treatment center located in the geographical area in which the requesting agency has jurisdiction.

Dated: April 24, 1987.

Edwin Meese III,

Attorney General.

[FR Doc. 87-10757 Filed 5-12-87; 8:45 am]

BILLING CODE 4410-01-M

## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### 32 CFR Part 43

[DoD Directive 1344.7]

#### Personal Commercial Solicitation on DoD Installations

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule amendment.

**SUMMARY:** This amendment would apply to the provisions reflected in Part 43 to Defense Agencies, since certain agencies are located on DoD installations and fall under the term "DoD Installation" as defined in Part 43.

It would allow an exception to the prohibition on advertising addresses or telephone numbers of commercial sales activities for members of military families authorized to conduct such activities in family housing.

**EFFECTIVE DATE:** April 21, 1987.

**ADDRESS:** Office of the Assistant Secretary of Defense (Force Management and Personnel), ODASD(MM&PP), PA&S, Room 3C975, The Pentagon, Washington, DC 20301-4000.

**FOR FURTHER INFORMATION CONTACT:** Ms. Barbara E. Schoenberger, telephone (202) 697-9525.

**SUPPLEMENTARY INFORMATION:** In the Federal Register on October 6, 1986 (51 FR 35535) the Department of Defense published a proposed change to Part 43. Comments were received and considered.

### List of Subjects in 32 CFR Part 43

Consumer protection, Military personnel, Federal building and facilities.

### PART 43—[AMENDED]

Accordingly, 32 CFR Part 43 is amended as follows:

1. The authority citation for Part 43 continues to read as follows:

Authority: 5 U.S.C. 301.

#### § 43.2 [Amended]

2. Section 43.2(a) is amended by removing the word "and" after "(OJCS)", changing the word "Commends" to "Commands," and adding "and the Defense Agencies" after "Commands".

#### § 43.6 [Amended]

3. Section 43.6(d)(14) is amended by removing the period at the end of the sentence and adding ", except for authorized activities conducted by members of military families residing in family housing."

Linda M. Lawson,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

May 7, 1987.

[FR Doc. 87-10885 Filed 5-12-87; 8:45 am]

BILLING CODE 3810-01-M

## VETERANS ADMINISTRATION

### 38 CFR Part 21

#### Veterans Education; Approval of Programs Leading to High School Diplomas

AGENCY: Veterans Administration.

**ACTION:** Final regulations.

**SUMMARY:** The law permits the Veterans Administration (VA) to pay educational assistance allowance under the Vietnam Era GI Bill and dependents' educational assistance under the Dependents' Educational Assistance Program to veterans and eligible spouses and surviving spouses who are pursuing a high school or an equivalency certificate. However, this assistance may not be paid if the veteran or eligible spouse or surviving spouse already has a high school diploma or equivalency certificate. Recently, some questions have arisen as to whether someone who has a secondary school diploma awarded by a school located in a foreign country may pursue another one in the United States. This regulatory amendment makes clear that the VA considers such a person to be already qualified for the objective of his or her program of education, i.e., successful completion of secondary level training. The VA may not pay educational assistance for the pursuit of another secondary school diploma or equivalency certificate in the United States.

**EFFECTIVE DATE:** April 20, 1987.

**FOR FURTHER INFORMATION CONTACT:**

June C. Schaeffer (225), Assistant Director for Education Policy and Program Administration, Vocational Rehabilitation and Education Service, Department of Veterans Benefits, Veterans Administration, 810 Vermont Avenue NW., Washington, DC 20420 (202) 233-2092.

**SUPPLEMENTARY INFORMATION:** On page 26914 of the *Federal Register* of July 28, 1986, there was published a proposal to amend Part 21 to state that the VA considers all high school diplomas to be equal in determining whether educational assistance allowance may be paid for pursuit of another one. Interested people were given 30 days to submit comments, suggestions or objections.

The VA received two letters. One was from a university official. An official of an educational organization wrote the other one. One writer stated that he had no comments to make on the proposal. The other objected to the proposal. In his opinion, foreign high school diplomas are not always the equivalent of diplomas from U.S. high schools.

The VA recognizes that even at the same high school a diploma may not represent the same amount of learning for each student. However, the VA does not possess the expertise to determine whether a diploma which a veteran or eligible person has already earned

represents more or less learning than the second diploma which he or she wishes to pursue. This is especially true when the first diploma is a foreign one. By considering all diplomas to be equal, the VA is applying the same principle that it does when, for example, it considers a veteran to be already qualified for the objective of bachelor's degree in history if he or she holds such a degree and wishes to obtain another one at a different college.

The VA will pay for refresher, remedial and deficiency courses if the holder of a high school diploma wishes to pursue training beyond the high school level and he or she needs those courses in order to pursue the new objective. The pertinent regulations provide that the VA will abide by determinations by experts outside the VA in determining whether these courses are needed. This ensures that those whose high school diploma represents less learning than the average are able to further their education. Hence, the VA is making the proposal final without change.

The VA has determined that this amended final regulation does not contain a major rule as that term is defined by E.O. 12291, entitled Federal Regulation. The regulation will not have a \$100 million annual effect on the economy, and will not cause a major increase in costs or prices for anyone. It will have no significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprise to compete with foreign-based enterprises in domestic or export markets.

The Administrator of Veterans Affairs has certified that this amended final regulation will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612. Pursuant to 5 U.S.C. 605(b), the amended regulation, therefore, is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

This certification can be made because the regulation concerns only the eligibility of individuals for educational assistance, and merely codifies present VA policy. It will have no significant economic impact on small entities, i.e., small businesses, small private and nonprofit organizations and small governmental jurisdictions.

The Catalog of Federal Domestic Assistance numbers for the programs affected by this regulation are 64.111 and 64.117.

**List of Subjects in 38 CFR Part 21**

Civil rights, Claims, Education, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Schools, Veterans, Vocational education, Vocational rehabilitation.

Approved: April 20, 1987.

Thomas K. Turnage,  
Administrator.

**PART 21—[AMENDED]**

38 CFR Part 21, *Vocational Rehabilitation and Education*, is amended by revising § 21.4230 paragraphs (d) introductory text and (d)(1) to read as follows:

**§ 21.4230 Requirements.**

\* \* \* \* \*

(d) *Selection—Chapter 34.* Except as provided in paragraphs (d) (1) and (2) of this section, the VA will approve a program of education under chapter 34 selected by an eligible veteran or serviceperson if it meets the requirements of paragraph (a) of this section; has an objective as described in paragraph (b) or (c) of this section; the courses or subjects in the program are approved for VA training; and the veteran or serviceperson is not already qualified for the objective of the program.

(1) A person who has previously received a secondary school diploma or an equivalency certificate from any jurisdiction shall be considered already qualified for those objectives, and, except as provided in § 21.4235(a)(2), may not pursue additional courses at the secondary school level which lead to another secondary school diploma or equivalency certificate.

(38 U.S.C. 1671)

\* \* \* \* \*

[FR Doc. 87-10753 Filed 5-12-87; 8:45 am]

BILLING CODE 8320-01-M

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 81**

[A-4-FRL-3198-9; AL-017]

**Designation of Areas for Air Quality Planning Purposes; Redesignation of Two Ozone Nonattainment Areas in Alabama**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Final rule.

**SUMMARY:** EPA is today granting the request by Alabama that Etowah County and Mobile County be redesignated from nonattainment to attainment for ozone. The redesignation of these counties to attainment is based on three years of ambient monitoring data showing a calculated expected exceedance of less than 1.0 per year and on implementation of EPA-approved control strategies.

**DATE:** This action is effective June 12, 1987 for all items.

**ADDRESSES:** Copies of the materials submitted by Alabama may be examined during normal business hours at the following locations:

Environmental Protection Agency,  
Region IV, Air Programs Branch, 345  
Courtland Street, NE., Atlanta,  
Georgia 30365

Air Division, Alabama Department of  
Environmental Management, 1751  
Federal Drive, Montgomery, Alabama  
36130

**FOR FURTHER INFORMATION CONTACT:**

Jill Thomas, Air Programs Branch, EPA  
Region IV, at the above address and  
telephone number 404/347-2864 or FTS  
257-2864.

**SUPPLEMENTARY INFORMATION:** In March  
3, 1978, *Federal Register* (43 FR 8962),

EPA designated Mobile County, Alabama as nonattainment for ozone. This designation was based on ambient air quality monitoring data which revealed that Mobile County had experienced oxidant violations. Several areas in Alabama were designated nonattainment for ozone and the State was therefore required to revise their state implementation plan (SIP) for ozone. Alabama drafted and adopted statewide regulations for controlling volatile organic compound (VOC) emissions from stationary sources. Through the Federal Motor Vehicle Control Program (FMVCP) and through implementation of Group I and Group II VOC regulations, Alabama demonstrated attainment of the ozone standard. EPA approved Alabama's ozone SIP on November 26, 1979 (44 FR 67375).

In the August 31, 1982, *Federal Register* (47 FR 38322), EPA changed the designation of Etowah County, Alabama to nonattainment for ozone. This designation was based upon exceedances measured in Etowah County during 1980-1981. Alabama was not required at this time to adopt new control requirements since the State had previously adopted a statewide plan for control of VOC emissions.

Alabama has requested that EPA change the attainment status of Etowah County and Mobile County from

nonattainment to attainment for ozone. In order to redesignate a nonattainment area, EPA policy requires that the most recent three years of ozone data show an expected exceedance calculation of less than or equal to 1.0 per year. In the event that three years of ozone data is not available, the most recent eight quarters of quality assured ambient air data may suffice provided that no exceedances have occurred. In addition, the data must be accompanied by a demonstration of implementation of an EPA-approved control strategy. Alabama has submitted ambient air quality data collected at the Attalla monitoring site located in Etowah County and at the Fort Everette and Salco monitoring sites located in Mobile County. The most recent three years of air quality data (1983, 1984, and 1985) for each county show the number of expected exceedances to be less than or equal to 1.0 per year. Furthermore, neither county has experienced any ozone exceedances during the 1986 ozone season.

Evidence reviewed by EPA indicates that the sources in Etowah and Mobile counties, to which the VOC regulations apply, are fully implementing the EPA approved control strategy.

For a more detailed discussion, please refer to the November 4, 1986, *Federal Register* (51 FR 40043) and to the Technical Support Document. Both documents are available for inspection at the EPA Region IV office.

On November 4, 1986 (51 FR 40043), EPA proposes to approve the request to redesignate Etowah County and Mobile County to attainment for ozone. At that time the public was invited to submit written comments on the proposed action. However, no comments were received.

**Final Action**

Therefore, on the basis of three years of air quality data showing attainment and evidence of an implemented EPA-approved control strategy, EPA today redesignates Etowah County and Mobile County from ozone nonattainment to attainment.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 13, 1987. This action may not be challenged later in proceedings to enforce its requirements. (See 307(b)(2)).

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

**Control Strategy Implementation**

Ozone SIP's are designed to satisfy the requirements of Part D of the Clean Air Act and to provide for attainment and maintenance of the ozone NAAQS. This redesignation today should not be interpreted as authorizing the State to delete, alter, or rescind any of the VOC emission limitations and restrictions contained in the approved ozone SIP. Changes to ozone SIP VOC regulations rendering them less stringent than those contained in the EPA approved plan cannot be made unless a revised plan for attainment and maintenance is submitted to and approved by EPA. Moreover, relaxations, deletions, and changes, absent EPA approval, could result in a finding of nonimplementation of the existing approved SIP and a consequent imposition of sanctions under sections 173(4) and 176(B) of the Clean Air Act.

**List of Subjects in 40 CFR Part 81**

Air pollution control, National parks, Wilderness areas.

Dated: May 7, 1987.

Lee M. Thomas,  
Administrator.

**PART 81—[AMENDED]**

Part 81 of Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 81 continues to read as follows:

Authority: 42 U.S.C. 7401-7642.

**Subpart C—Section 107 Attainment Status Designation**

**§ 81.301 [Amended]**

2. Section 81.301 is amended by removing from the "Alabama—O<sub>3</sub>" table the entries for Etowah County and Mobile County.

[FR Doc. 87-10907 Filed 5-12-87; 8:45 am]  
BILLING CODE 6560-50-M

**40 CFR Part 81**

[A-4-FRL-3199-1; FL-017]

**Designation of Areas for Air Quality Planning Purposes; Redesignating of an Ozone Nonattainment Area in Florida**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Final rule.

**SUMMARY:** EPA is today granting the request by Florida to redesignate Orange County from nonattainment to

attainment for ozone. The redesignation of Orange County to attainment is based on two years of quality assured monitoring data without an exceedance at one site, three years of ambient monitoring data showing a calculated expected exceedance of less than 1.0/year at a second site, and implementation of an EPA-approved control strategy.

**DATE:** This action is effective June 12, 1987.

**ADDRESSES:** Copies of the materials submitted by Florida may be examined during normal business hours at the following locations:

Environmental Protection Agency,  
Region IV, Air Programs Branch, 345  
Courtland Street NE., Atlanta, Georgia  
30365

Bureau of Air Quality Management,  
Florida Department of Environmental  
Regulation, Twin Towers Office  
Building, 2600 Blair Stone Road,  
Tallahassee, Florida 32301-8241

**FOR FURTHER INFORMATION CONTACT:**

Mr. Thomas Hansen, Air Programs  
Branch, EPA Region IV, at the above  
address and telephone number 404/347-  
4292 or FTS 257-4292.

**SUPPLEMENTARY INFORMATION:** On August 29, the FDER submitted a request to redesignate Orange County to attainment, along with technical support data detailing the volatile organic compound (VOC) emission reductions in Orange County. Florida has submitted ambient air quality data collected at two monitoring sites in Orlando, Florida. The basis for the redesignation request is two years of quality assured ozone monitoring data without an exceedance at the Seminole County site, and three years of quality assured ozone monitoring data with a calculated expected exceedance of less than 1.0/year at the Orange County site. These two monitoring locations represent the urban area of Orlando, Florida.

Also, except for one source currently involved in a State-initiated legal proceeding relating to the source's compliance status, evidence reviewed by EPA indicates that Orange County has implemented an EPA-approved control strategy. This strategy consists of reasonably available control technology on various categories of existing sources as required by EPA, control of new sources to lowest achievable emission rate levels, and the Federal Motor Vehicle Control Program. Today's approval is issued with the expectation that Florida will continue to pursue the necessary course of action to ensure final compliance by the source, with the EPA-approved control strategy.

For a more detailed discussion, please refer to the July 9, 1986, **Federal Register** (51 FR 24855) and Technical Support Document. Both documents are available for inspection at the EPA Region IV office.

In the July 9, 1986, notice EPA proposed to approve the request to redesignate Orange County to attainment for ozone. At that time the public was invited to submit written comments on the proposed action. However, no comments were received.

**Final Action**

Therefore, on the basis of two years of air quality data at the Seminole County site and three years of air quality data at the Orange County site showing attainment, and evidence of an implemented EPA-approved control strategy, EPA today redesignates Orange County from ozone nonattainment to attainment.

**Control Strategy Implementation**

Ozone State Implementation Plans (SIP's) are designed to satisfy the requirements of Part D of the Clean Air Act and to provide for attainment and maintenance of the ozone NAAQS. This redesignation today should not be interpreted as authorizing the State to delete, alter, or rescind any of the VOC emission limitations and restrictions contained in the approved ozone SIP. Changes to ozone SIP VOC regulations rendering them less stringent than those contained in the EPA-approved plan cannot be made unless a revised plan for attainment and maintenance is submitted to and approved by EPA. Unauthorized relaxations, deletions, and changes could result in both a finding of nonimplementation (section 173(b) of the Clean Air Act) and in a SIP deficiency call made pursuant to section 110(a)(2)(H) of the Clean Air Act.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 13, 1987. This action may not be challenged later in proceedings to enforce its requirements. (See 307(b)(2).)

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

**List of Subjects in 40 CFR Part 81**

Air pollution control, National parks, Wilderness areas.

Dated: May 7, 1987.

Lee M. Thomas,  
Administrator.

**PART 81—[AMENDED]**

Part 81 of Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 81 continues to read as follows:

Authority: 42 U.S.C. 7401-7642.

**Subpart C—Section 107 Attainment Status Designations**

**§ 81.310 [Amended]**

2. In § 81.310 the attainment status table titled "Florida—03" is amended by removing the entry for Orange County.

[FR Doc. 87-10908 Filed 5-12-87; 8:45 am]

BILLING CODE 6560-50-M

**40 CFR Part 180**

[PP 1E2457/R887; FRL 3196-6]

**Pesticide Tolerance for 3-(3,5-Dichlorophenyl)-5-Ethenyl-5-Methyl-2,4-Oxazolidinedione**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This document establishes a tolerance for the combined residues of the fungicide 3-(3,5-dichlorophenyl)-5-ethenyl-5-methyl-2,4-oxazolidinedione (hereafter referred to in the preamble as "vinclozolin") and its metabolites containing the 3,5-dichloroaniline moiety in or on grapes at 6.0 parts per million (ppm). This regulation, to establish a maximum premissible level for residues of vinclozolin on grapes, was requested by BASF Wyandotte Corp.

**EFFECTIVE DATE:** Effective on May 13, 1987.

**ADDRESS:** Written objections may be submitted to the Hearing Clerk (A-110), Environmental Protection Agency, Room 3708, 401 M Street, SW., Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:**

By mail: Lois A. Rossi, Product Manager (PM) 21, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Office location and telephone number: Room 227, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703-557-1900).

**SUPPLEMENTARY INFORMATION:** EPA issued a notice, published in the **Federal Register** of June 23, 1982 (47 FR 27126),

which announced that BASF Wyandotte Corp., Agricultural Chemical Division, 110 Cherry Hill Road, Parsippany, New Jersey 07054 submitted pesticide petition 1E2457 proposing the establishment of a tolerance for the combined residues of the fungicide vinclozolin and its metabolites in or on the raw agricultural commodity table grapes at 6.0 parts per million (ppm).

This tolerance will expire in one year from the date of publication of this final rule unless processing data on raisins are submitted. In order for the tolerance of 6.0 ppm on table grapes to remain in effect beyond one year from the date of publication of this rule, that data must indicate that residues do not concentrate to a level above 30 ppm in the raisins.

The data submitted in the petition and all other relevant material have been evaluated. The toxicological data considered in support of the proposed tolerance include the following:

1. A 90-day rat feeding study with a no-observed-effect level (NOEL) of 450 ppm (22.5 mg/kg/day) the highest dose tested.
2. A 90-day dog feeding study with a NOEL of 300 ppm (7.5 mg/kg/day).
3. A 6-month dog feeding study with a NOEL of 100 ppm (2.5 mg/kg/day).
4. A mouse teratology study with a NOEL for maternal toxicity of 6,000 ppm (900 mg/kg/day) highest dose tested, and a NOEL for developmental toxicity of 600 ppm (90 mg/kg/day).
5. A rabbit teratology study with a NOEL for maternal toxicity of >300 mg/kg/day (9,900 ppm) and a NOEL for developmental toxicity of 80 mg/kg/day (2,640 ppm) Levels tested: 0, 600, 6,000, and 60,000 ppm.
6. A chronic feeding/oncogenicity study in rats for 103 weeks, with a NOEL of 486 ppm (24 mg/kg), and no compound-related oncogenic effects under the conditions of the study at doses up to 4,374 ppm (219 mg/kg bw/day), the highest dose tested.
7. A chronic feeding/oncogenicity study in mice for 26 months, with a NOEL of 486 ppm (73 mg/kg) and no compound-related oncogenic effects under the conditions of the study at doses up to 4,374 ppm (503 mg/kg bw/day), the highest dose tested.
8. A dominant lethal assay in mice negative at 2,000 mg/kg (only level tested).
9. Sister chromatid exchange study in the bone marrow of the Chinese hamster was negative.
10. Reverse mutation test with and without a metabolic activation system which was negative for mutagenic effects.

A primary rate hepatocyte unscheduled DNA synthesis assay which showed negative mutagenic activity and a mouse lymphoma forward mutation assay which showed weak positive mutagenic activity only at concentrations exceeding solubility in the test medium. The studies satisfy requirements for DNA damage/repair assay in mammalian cells, and gene mutation cells in culture.

Based on the NOEL of 100 ppm in the 6-month dog feeding study, and using a hundred-fold uncertainty factor, the acceptable daily intake (ADI) for vinclozolin is calculated to be 0.025 mg/kg/day. The maximum permitted intake (MPI) for a 60-kg human is calculated to be 1.5 mg/day. The theoretical maximum residue contribution (TMRC) from existing tolerances for a 1.5-kg diet is calculated to be 0.01199 mg/day. The proposed action would increase the TMRC to 0.0130 mg/day, utilize an additional 8.13 percent of the TMRC to bring the total percent of the ADI utilized to 51.84 percent, and result in a 3.9 percent increase of the ADI.

The nature of the residues is adequately understood and an adequate analytical method, gas chromatography using an electron capture detector, is published in Vol. II of the Food and Drug Administration (FDA) Pesticide Analytical Manual for enforcement purposes. There is no reasonable expectation of residues in eggs, milk, meat, or poultry from the use on table grapes.

Based on the data and information considered by the Agency, it is concluded that the pesticide is useful for the purpose for which the tolerance is sought, and it is concluded that the establishment of the tolerance will protect the public health. Therefore, the tolerance is established as set forth below for a period of one year from the date of publication of this rule unless processing data on raisins are submitted indicating that residues do not concentrate to a level above 30 ppm in the raisins.

Any person adversely affected by this regulation may, within 30 days after publication of this notice in the **Federal Register**, file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing and the grounds for the objections.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 4 U.S.C. 601 through 612), the Administrator has determined that regulations establishing tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

#### List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 28, 1987.

Douglas D. Camp,  
Director, Office of Pesticide Programs.

#### PART 180—[AMENDED]

Therefore, 40 CFR Part 180 is amended as follows:

1. The authority citation for Part 180 continues to read as follows:

Authority: 21 U.S.C. 346a.

2. Section 180.380 is amended by designating the existing introductory paragraph and list of commodities as paragraph (a) and adding paragraph (b) to read as follows:

§ 180.380 3-(3,5-Dichlorophenyl)-5-ethynyl-5-methyl-2,4-oxazolidinedione; tolerances for residues.

(a) \* \* \*

(b) A tolerance is established until May 13, 1988, for combined residues of the fungicide, 3-(3,5-dichlorophenyl)-5-ethynyl-5-methyl-2,4-oxazolidinedione and its metabolites containing the 3,5-dichloroaniline moiety, in or on the raw agricultural commodity grapes at 6.0 parts per million.

Commodities	Parts per million
Grapes.....	6.0

[FR Doc. 87-10359 Filed 5-12-87; 8:45 am]

BILLING CODE 6560-50-M

#### FEDERAL EMERGENCY MANAGEMENT AGENCY

##### 44 CFR Part 64

[Docket No. FEMA 6751]

#### Suspension of Community Eligibility

AGENCY: Federal Emergency  
Management Agency, FEMA.

**ACTION:** Final rule.

**SUMMARY:** This rule lists communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are suspended on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If FEMA receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will be withdrawn by publication in the *Federal Register*.

**EFFECTIVE DATES:** The third date ("Susp.") listed in the third column.

**FOR FURTHER INFORMATION CONTACT:**

Frank H. Thomas, Assistant Administrator, Office of Loss Reduction, Federal Insurance Administration, (202) 646-2717, Federal Center Plaza, 500 C Street, Southwest, Room 416, Washington, DC 20472.

**SUPPLEMENTARY INFORMATION:** The National Flood Insurance Program (NFIP), enables property owners to purchase flood insurance at rates made reasonable through a Federal subsidy. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4022), prohibits flood insurance coverage as authorized under the National Flood Insurance Program (42 U.S.C. 4001 through 4128) unless an appropriate public body shall have adopted adequate floodplain management measures with effective enforcement measures. The communities listed in this notice no longer meet that statutory requirement for compliance with program regulations (44 CFR Part 59 *et seq.*). Accordingly, the

communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the *Federal Register*. In the interim, if you wish to determine if a particular community was suspended on the suspension date, contact the appropriate FEMA Regional Office or the NFIP servicing contractor.

In addition, the Federal Emergency Management Agency has identified the special flood hazard areas in these communities by publishing a Flood Hazard Boundary Map. The date of the flood map, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Disaster Relief Act of 1974 not in connection with a flood) may legally be provided for construction or acquisition of buildings in the identified special flood hazard area of communities not participating in the NFIP and identified for more than a year, on the Federal Emergency Management Agency's initial flood insurance map of the community as having flood-prone areas. (Section 202(a) of the Flood Disaster Protection Act of 1973 (Pub. L. 93-234), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column.

The Administrator finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed

in this final rule have been adequately notified. Each community receives a 6-month, 90-day, and 30-day notification addressed to the Chief Executive Officer that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. For the same reasons, this final rule may take effect within less than 30 days.

Pursuant to the provision of 5 U.S.C. 605(b), the Administrator, Federal Insurance Administration, FEMA, hereby certifies that this rule if promulgated will not have a significant economic impact on a substantial number of small entities. As stated in section 2 of the Flood Disaster Protection Act of 1973, the establishment of local floodplain management together with the availability of flood insurance decreases the economic impact of the future flood losses to both the particular community and the nation as a whole. This rule in and of itself does not have a significant economic impact. Any economic impact results from the community's decision not to (adopt) (enforce) adequate floodplain management, thus placing itself in noncompliance of the Federal standards required for community participation. In each entry, a complete chronology of effective dates appears for each listed community.

**List of Subjects in 44 CFR Part 64**

Flood insurance—floodplains.

**PART 64—[AMENDED]**

The authority citation for Part 64 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*, Reorganization Plan No. 3 of 1978, E.O. 12127.

Section 64.6 is amended by adding in alphabetical sequences new entries to the table.

**§ 64.6 List of eligible communities.**

State and location	Community No.	Effective dates of authorization/cancellation of sale of flood insurance in community	Current effective map date	Date <sup>1</sup>
<b>Region I</b>				
Maine:				
Bowdoinham, town of, Sagadahoc County	230119	Apr. 16, 1981, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp	May 19, 1987	June 19, 1987
Dresden, town of, Lincoln County	230084	Mar. 28, 1978, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp	do	Do.
Massachusetts: Malden, city of, Middlesex County	250202	July 25, 1975, Emerg.; May 19, 1987, Reg.; May 18, 1987, Susp	do	Do.
<b>Region II</b>				
New York:				
Chazy, town of, Clinton County	361310	Apr. 14, 1978, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp	do	Do.
Highlands, town of, Orange County	361251	June 9, 1975, Emerg.; Nov. 30, 1979, Reg.; May 19, 1987, Susp	do	Do.
Highland Falls, village of, Orange County	361453	July 2, 1974, Emerg.; June 25, 1976, Reg.; May 19, 1987, Susp	do	Do.
<b>Region III</b>				
Pennsylvania:				
Cornplanter, township of, Venango County	422533	July 7, 1975, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp	do	Do.
Ford City, borough of, Armstrong County	420094	Dec. 3, 1974, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp	do	Do.

State and location	Community No.	Effective dates of authorization/cancellation of sale of flood insurance in community	Current effective map date	Date <sup>1</sup>
Frenchcreek, township of, Venango County.	422110	Feb. 17, 1977, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	do	Do.
Indiana, borough of, Indiana County.	420501	Jan. 27, 1977, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	do	Do.
Manor, township of, Armstrong County.	421309	July 7, 1985, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	do	Do.
Rouseville, borough of, Venango County.	420839	July 11, 1975, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	do	Do.
Sugarcreek, borough of, Venango County.	420840	July 7, 1975, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	do	do.
Summit, township of, Crawford County.	422400	June 27, 1975, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	do	do D
White, township of, Indiana County.	421725	Feb. 26, 1976, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	do	Do.
<b>Region IV</b>				
Georgia:				
Chatham County, unincorporated areas.	130030	Sept. 18, 1970, Emerg.; Aug. 1, 1980, Reg.; May 19, 1987, Susp.	do	Do.
Garden City, city of, Chatham County.	135162	Oct. 8, 1971, Emerg.; Mar. 16, 1973, Reg.; May 19, 1987, Susp.	do	Do.
Tennessee:				
Graysville, city of, Rhea County.	470153	July 9, 1975, Emerg.; Mar. 19, 1973, Reg.; May 19, 1987, Susp.	do	Do.
Kimball, town of, Marion County.	470116	July 1, 1976, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	do	Do.
Ripley, town of, Lauderdale County.	470100	Jan. 23, 1975, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	do	Do.
<b>Region V</b>				
Minnesota: Winona County, unincorporated areas.	270525C	May 16, 1974, Emerg.; Jan. 18, 1984, Reg.; May 19, 1987, Susp.	Jan. 18, 1984.	Do.
<b>Region VIII</b>				
Colorado: Rio Grande County, unincorporated areas.	080153	June 25, 1975, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	May 19, 1987.	Do.
Montana:				
Blaine County, unincorporated areas.	300144	Mar. 7, 1978, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	do	Do.
Chinook, city of, Blaine County.	300003	May 3, 1974, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	do	Do.
Harlem, city of, Blaine County.	300004	June 20, 1975, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	do	Do.
Livingston, city of, Park County.	300051	May 12, 1975, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	do	Do.
Phillips, city of, Phillips County.	300162	Mar. 24, 1978, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	do	Do.
<b>Region IX</b>				
Arizona: Cochise County, unincorporated areas.	340012	July 29, 1975, Emerg.; Dec. 4, 1984, Reg.; May 19, 1987, Susp.	do	Do.
California: Siskiyou County, unincorporated areas.	060362	Feb. 23, 1973, Emerg.; May 17, 1982, Reg.; May 19, 1987, Susp.	do	Do.
<b>Region I—Minimal Conversions</b>				
New Hampshire: Brookline, town of, Hillsborough County.	330180	Aug. 12, 1985, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	do	May 19, 1987
<b>Region II</b>				
New York: Milford, town of, Otsego County.	361274	Jan. 16, 1976, Emerg.; May 19, 1987, Reg.; May 19, 1987, Susp.	do	Do.

<sup>1</sup> Certain Federal assistance no longer available in special flood hazard areas.

Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Harold T. Duryee,  
Administrator, Federal Insurance  
Administration.

[FR Doc. 87-10876 Filed 5-12-87; 8:45 am]

BILLING CODE 6718-03-M

# Proposed Rules

Federal Register

Vol. 52, No. 92

Wednesday, May 13, 1987

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 86-NM-171-AD]

#### Airworthiness Directives; CASA Model C-212 Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of Proposed Rulemaking (NPRM).

**SUMMARY:** This notice proposes an airworthiness directive (AD), applicable to CASA Model C-212 series airplanes, that would require replacement of certain elevator, rudder, and aileron trim control system rods, levers, links, and tabs. The FAA has determined that, in the event of certain single failures in these trim control systems, the potential exists for damage to the airframe due to flutter. The replacement components would add fail-safe features to the trim control systems.

**DATE:** Comments must be received no later than July 3, 1987.

**ADDRESSES:** Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Office of the Regional Counsel (Attention: ANM-103), Attention: Airworthiness Rules Docket No. 86-NM-171-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Construcciones Aeronauticas S.A., Getafe, Madrid, Spain. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

**FOR FURTHER INFORMATION CONTACT:** Ms. Judy Golder, Standardization Branch, ANM-113; telephone (206) 431-1967. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway

South, C-68966, Seattle, Washington 98168.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

##### Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Office of the Regional Counsel (Attention: ANM-103), Attention: Airworthiness Rules Docket No. 86-NM-171-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

##### Discussion

The FAA has determined that an unsafe condition may exist on Construcciones Aeronauticas S.A. (CASA) Model C-212 series airplanes. Certain elevator, rudder, and aileron trim control system rods, levers, links, and tabs installed on these airplanes have been determined not to have the fail-safe design features required by Federal Aviation Regulations (FAR) §§ 25.629(d)(4)(ii) and 25.671. These fail-safe tab requirements were developed after service experience in similarly-designed airplanes showed that a tab control system single failure was one of the most frequent causes of airframe damage due to flutter. CASA has developed new trim control system components with fail-safe design features to replace existing components, and has issued CASA Service Bulletin

212-27-25, Revision 2, dated October 23, 1985, which described the installations of the replacement elevator, rudder, and aileron trim control system components. The Spanish Dirección General de Aviación Civil (DGAC) has approved the CASA service bulletin and recommended the affected component replacement in accordance with the CASA service bulletin.

This airplane model is manufactured in Spain and type certificated in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement.

Since these conditions are likely to exist or develop on airplanes of this model registered in the United States, an AD is proposed that would require replacement of the elevator, rudder, and aileron trim control system components in accordance with the previously mentioned service bulletin.

It is estimated that 41 airplanes of U.S. registry would be affected by this AD, that it would take approximately 130 manhours per airplane to accomplish the required actions, and that the average labor cost would be \$40 per manhour. Modification parts are estimated at \$28,254 per airplane. Based on these figures, the total cost impact of this AD to U.S. operators is estimated to be \$1,453,614.

For the reasons discussed above, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities because a substantial number of small entities are not affected. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

#### List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

#### The Proposed Amendment

##### PART 39—[AMENDED]

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration

proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations as follows:

1. The authority citation for Part 39 continues to read as follows:

**Authority:** 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised) Pub. L. 97-449, January 12, 1983; and 14 CFR 11.89.

**§ 39.13 [Amended]**

2. By adding the following new airworthiness directive:

**Casa:** Applies to CASA Model C-212 series airplanes as listed in CASA Service Bulletin 212-27-25, Revision 2, dated October 23, 1985, certificated in any category. Compliance is required within 18 months after the effective date of this AD, unless previously accomplished.

To prevent airframe damage due to flutter caused by certain single failure conditions of the trim control system, accomplish the following:

A. Replace elevator, rudder, and aileron trim control system components in accordance with CASA Service Bulletin 212-27-25, Revision 2, dated October 23, 1985.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of the modification required by this AD.

All persons affected by this proposal who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Construcciones Aeronauticas S.A., Getafe, Madrid, Spain. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on May 6, 1987.

Wayne J. Barlow,

Director, Northwest Mountain Region.

[FR Doc. 87-10858 Filed 5-12-87; 8:45 am]

BILLING CODE 4910-13-M

**14 CFR Part 39**

[Docket No. 87-NM-44-AD]

**Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB-120 Series Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of Proposed Rulemaking (NPRM).

**SUMMARY:** This notice proposes a new airworthiness directive (AD), applicable to EMBRAER Model EMB-120 series airplanes, which would require inspection of the main landing gear outboard wheel half for cracks and replacement, if necessary. This proposal is prompted by a report of cracking in the outboard wheel half. This condition, if not corrected, could lead to failure of the wheel halves, which could result in loss of control of the airplane.

**DATE:** Comments must be received no later than July 3, 1987.

**ADDRESSES:** Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 86-NM-44-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from BFGoodrich, Aerospace and Defense Division, Aircraft Wheel and Brake Operations, P.O. Box 340, Troy, Ohio 45373. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the FAA, Central Region, Atlanta Aircraft Certification Office, Suite 210, 1669 Phoenix Parkway, Atlanta, Georgia.

**FOR FURTHER INFORMATION CONTACT:** Mr. Curtis A. Jackson, Aerospace Engineer, ACE-120A, FAA, Central Region, Atlanta Aircraft Certification Office, Suite 210, 1669 Phoenix Parkway, Atlanta, Georgia 30349; telephone (404) 991-2910.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact concerned with the substance of this proposal will be filed in the Rules Docket.

**Availability of NPRM**

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 86-NM-44-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

**Discussion**

The FAA has received a report of a crack found on an EMBRAER Model EMB-120 airplane in a flange of the outboard wheel half. BFGoodrich part number 300-603. The cause of the cracking has been attributed to improper forging techniques used during manufacture of the wheel. This wheel is used only on EMBRAER Model EMB-120 series airplanes. A cracked wheel could lead to wheel failure and resultant loss of control of the airplane.

The FAA has reviewed and approved BFGoodrich Service Bulletin 467, dated March 9, 1987, which describes procedures for visual, eddy current, and ultrasonic inspections of the wheel to detect cracking.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD is proposed which would require inspection of the main landing gear outboard wheel halves and replacement, if necessary, in accordance with the service bulletin previously mentioned.

It is estimated that 22 airplanes of U.S. registry would be affected by this AD, that it would take approximately 7 manhours per airplane to accomplish the required actions, and that the average labor cost would be \$40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$6,160.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities because of the minimal cost of compliance per airplane (\$280). A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

**List of Subjects in 14 CFR Part 39**

Aviation safety, Aircraft.

## The Proposed Amendment

### PART 39—[AMENDED]

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

2. By adding the following new airworthiness directive:

#### § 39.13 [Amended]

**Empresa Brasileira de Aeronautica S.A. (EMBRAER):** Applies to Model EMB-120 series airplanes, certificated in any category, equipped with outboard main landing gear wheel halves identified by serial numbers in BF Goodrich Service Bulletin 467, dated March 9, 1987. Compliance required as indicated, unless previously accomplished.

To prevent failure of the main landing gear outboard wheel half, accomplish the following:

A. Within the next 200 landings after the effective date of this AD, inspect the main landing gear outboard wheel halves, part number 300-603, for cracking, using visual and eddy current methods, in accordance with BFGoodrich Service Bulletin 467, dated March 9, 1987.

1. If a crack is found, prior to further flight replace the wheel half with an airworthy FAA-approved assembly.

2. If no cracks are found, repeat the visual and eddy current inspections at intervals not to exceed 300 landings, until such time as an ultrasonic inspection is accomplished and each affected wheel half is found free of defects and identified with the impression stamping in accordance with Figure 1 of BFGoodrich Service Bulletin 467, dated March 9, 1987. Any wheel found to be defective must be replaced prior to further flight with an airworthy FAA-approved assembly.

B. For the purposes of complying with this AD, the number of landings may be determined by substituting one landing for each ½ hour of flight, unless the operator substantiates a different flight hours-to-landing ratio. This substantiating must be submitted to and approved by the Manager, Atlanta Aircraft Certification Office, FAA, Central Region.

C. Alternate means of compliance with provide an acceptable level of safety may be used when approved by the Manager, Atlanta Aircraft Certification Office, FAA, Central Region.

D. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the

manufacturer may obtain copies upon request to BFGoodrich, Aerospace and Defense Division, Aircraft Wheel and Brake Operations, P.O. Box 340, Troy, Ohio 45373. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the FAA, Central Region, Atlanta Aircraft Certification Office, Suite 210, 1669 Phoenix Parkway, Atlanta, Georgia.

Wayne J. Barlow,  
Director, Northwest Mountain Region.  
[FR Doc. 87-10860 Filed 5-12-87; 8:45 am]  
BILLING CODE 4910-13-M

## FEDERAL TRADE COMMISSION

### 16 CFR Part 13

[Docket 9154]

#### Volkswagen of America, Inc., et al.; Proposed Consent Agreement With Analysis To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement.

**SUMMARY:** In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would require, among other things, a Troy, Mich. automobile company to offer impartial third-party arbitration programs to owners of certain Volkswagens and Audis with faulty valve seals and other oil consumption-related problems or with any internal engine component problems. This proposed consent agreement was originally published in the Federal Register on Friday, April 17, 1987 but did not include the attachments to the proposed order.

**DATE:** Comments will be received until June 16, 1987.

**ADDRESS:** Comments should be addressed to: FTC/Office of the Secretary, Room 136, 6th Street and Pennsylvania Avenue NW, Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** FTC/H-238A, Robert M. Doyle, Washington, DC 20580. (202) 326-3114.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 3.25(f) of the Commission's Rules of Practice (16 CFR 3.25(f)), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period

of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(14) of the Commission's Rules of Practice (16 CFR 4.9(b)(14)).

### List of Subjects in 16 CFR Part 13

Arbitration, Automobiles, Trade practices.

### Agreement Containing Consent Order to Cease and Desist

In the Matter of Volkswagen of America, Inc., a Corporation, and Volkswagen AG, a Corporation, Respondents.

The Agreement herein, by and between Volkswagen of America, Inc., a corporation ("VWofA"), hereinafter sometimes referred to as respondent, by its duly authorized officer, and its attorneys, and Volkswagen AG, a corporation ("VWAG"), by its attorneys, and counsel for the Federal Trade Commission, is entered into in accordance with the Commission's Rule governing consent order procedures. In accordance therewith the parties hereby agree that:

1. Respondent Volkswagen of America, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 888 West Big Beaver Road, in the City of Troy, State of Michigan.

Volkswagen AG is a corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany with its office and principal place of business located at 3180 Wolfsburg, Federal Republic of Germany.

2. Respondent Volkswagen of America and Volkswagen AG have each been served with a copy of the Complaint issued by the Federal Trade Commission charging them with violation of section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45 (a)(1980), and have each filed an answer to said complaint denying said charges.

3. This Agreement is for settlement purposes only and does not constitute an admission by respondent VWofA or by VWAG that the law has been violated as alleged in the said copy of the Complaint issued by the Commission.

4. Respondent Volkswagen of America, Inc. admits the jurisdictional facts set forth in the Commission's Complaint in this proceeding, except as set forth in Paragraph 3 of said Complaint.

5. Respondent Volkswagen of America, Inc. waives:

- (a) Any further procedural steps;
- (b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this Agreement.

6. This Agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this Agreement is accepted by the Commission, it will be placed on the public record for a period of (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this Agreement and so notify the respondent, in which event it will take such action as it may consider appropriate, or issue and serve its decision, in disposition of the proceeding.

7. This Agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 3.25(f) of the Commission's Rules, the Commission may, without further notice to respondent VWoA: (1) Issue its decision containing the following Order to Cease and Desist in disposition of the proceeding, and (2) make information public in respect thereto. When so entered, the Order to Cease and Desist shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders. The Order shall become final upon service. Delivery by the U.S. Postal Service of the decision containing the agreed to Order to respondent's address as stated in this Agreement shall constitute service. Respondent waives any right it may have to any other manner of service. The Complaint and Answer may be used in construing the terms of the Order not defined therein, and no agreement, understanding, representation, or interpretation not contained in the order or the Agreement may be used to vary or contradict the terms of the Order.

8. Respondent Volkswagen of America has read the Complaint and the Order contemplated hereby. It understands that once the Order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order. Respondent further understands that it may be liable for civil penalties in the amount provided by law for each

violation of the Order after it becomes final.

9. Volkswagen AG is a party to this agreement only for purposes of the dismissal of the complaint filed against it in Docket 9154.

## Order

### Definitions

For the purposes of this Order, the following definitions shall apply:

A. "VWoA"—Volkswagen of America, Inc., and its successors and assigns, and their officers, representatives, agents, and employees.

B. "Covered Vehicle"—A 1974-1979 model year gasoline powered Volkswagen or Audi vehicle equipped with a water-cooled engine, that was: (1) Distributed for sale in the United States by VWoA,

(2) Warranted in writing by VWoA, or

(3) Certified by the manufacturer to the National Highway Traffic Safety Administration and Environmental Protection Agency as meeting Federal safety and emissions standards.

C. "Specified Claims"—Claims made at any time prior to the expiration date of this Order by present or former owners or lessees (unless the lessor bore the cost of the claim) of covered vehicles concerning excessive oil consumption or engine damage due to lack of lubrication in covered vehicles other than claims for personal injury, damage to property other than the vehicle itself, or consequential damages such as lost value, profits, wages, or business opportunities. Specified claims do not include claims for which the owner or lessee has executed a release in consideration of settlement of an individual lawsuit. Specified claims also do not include claims that are covered by a binding final judgment on the merits in an individual lawsuit.

D. "Dealer"—Any person, partnership, firm or corporation which, pursuant to a Volkswagen or Audi Dealer Agreement with VWoA or any of its independent distributors, purchases or receives on consignment from VWoA or its independent distributors vehicles for resale or lease to the public, including persons, partnerships, firms, or corporations owned or operated by VWoA or its independent distributors.

E. "Internal engine components"—All gasoline and diesel engine parts, components, and subassemblies included within the complete short block and cylinder head assemblies, including short blocks and cylinder heads, camshafts, valve train components, timing gears, flywheels, pistons, piston rings, crankshafts, connecting rods, and

bearings, oil pumps, and associated fasteners, seals and gaskets.

F. "Product Service Publication" ("PSPs")—"Product Circulars," "Service Circulars," "Technical Bulletins," and other documents substantially the same in content and purpose issued from time to time by VWoA to dealers, to regional offices or to independent distributors, or individual articles, notices, entries or the like in such documents, which describe, or recommend or discuss:

(1) Diagnostic, repair, or maintenance procedures; or

(2) Additional parts or upgrades or different replacement parts; or

(3) Non-repair information regarding the use and care of vehicles.

If a publication contains more than one subject which is considered a PSP, then each such subject shall be considered to be an individual PSP.

PSPs do not include publicly available repair manuals, parts catalogs, price lists or supplements thereto.

G. "Product Condition"—The condition of a vehicle that gives rise to any repair, maintenance, use and care or diagnostic procedures or the use of additional, upgraded or different parts, that is or would be described in PSPs.

H. "PSP Index"—A document, clear and comprehensible to prospective purchasers and vehicle owners, which contains entries for all PSPs published during the term of this Order by VWoA.

(1) Each index shall contain an introductory section, which shall include the following information clearly and conspicuously stated:

(a) An explanation of the PSP Index and the "PSP Highlights" section;

(b) How to obtain PSPs from VWoA and how to review PSPs at VWoA's dealers;

(c) How to locate the "PSP Highlights" section; and

(d) The PSP prepared and issued pursuant to Paragraph G(1) of Section V.

(2) For each entry in the PSP Index, the following information will be clearly and conspicuously stated:

(a) The particular models(s), model year(s), and Vehicle Identification Numbers (if the PSP does not apply to the entire model year) to which the entry applies or potentially applies;

(b) The subject of the PSP;

(c) The major component or system of components to which the PSP relates;

(d) The identifying number of the PSP to which the entry relates; and

(e) Whether there is an entry in the "PSP Highlights" Section of the PSP index for the PSP;

(3) The PSP Index shall contain a separate section, readily accessible, entitled "PSP Highlights."

I. "PSP Highlights"—Information related to a particular PSP, that includes all of the following items as applicable:

- (1) A description of the product condition;
- (2) A description of the principal symptoms of the product condition;
- (3) The steps or possible steps that can be taken to minimize or avoid the product condition;
- (4) A statement that additional, upgraded or different parts are called for to address the product condition;
- (5) A statement that the diagnostic, repair or maintenance procedure discussed in the PSP has to be repeated;
- (6) A statement of the immediate and long-range performance consequences of the product condition; and, if avoidance of repair costs is a reason for undertaking the procedure, a statement of the estimated repair costs, if known, or, if not known, a characterization of such costs of not performing the procedures in a timely manner;
- (7) The following statement: "The estimated cost of repairing this condition is [less than \$150] [approximately \$150-\$250] [approximately \$250-\$400] [approximately \$400-\$800] [more than \$800]." The cost range included shall be based on the cost calculated according to the formula set forth in Definition J(2);
- (8) A description of the underlying PSP(s) sufficient to permit an interested person to identify and order the PSP(s) from VWoA or review it at a dealer; and
- (9) To the extent not apparent from the foregoing, a disclosure of the primary intended benefit(s) of this information.

J. "Costs"—

(1) "Reference cost" in Paragraph D of Section I means one hundred sixty-five dollars (\$165), adjusted in the month when this order is served and annually thereafter, by a ratio, the numerator of which is the most recently published quarterly "Implicit Price Deflator" for the Gross National Product (IPD), and the denominator of which is the IPD for the second quarter of 1985, adjustments to be rounded to the nearest dollar. IPDs used in these annual adjustments shall have been computed using the same base year.

(2) "Cost(s)" other than "reference cost" in Paragraph D of Section I shall be calculated by adding the suggested retail price for parts which are or may be required and the applicable national average dealer warranty labor rate charges multiplied by the time required to effectuate the repair, replacement, diagnosis or maintenance as determined by the applicable Suggested Repair Times Manual or other labor time guide

used by VWoA in the calculation of warranty reimbursement rates.

K. "Background Statements"—The documents attached hereto as Attachments A, and A100, B, and B100.

L. "Claimant"—Any person, partnership, corporation, or other entity, other than

- (a) A dealer, or
- (b) Any other entity which is engaged in the business of repairing, servicing, selling, leasing or trading motor vehicles or motor vehicle engines, or
- (c) A commercial enterprise which operates a fleet of more than fifteen vehicles.

M. "United States"—The fifty states, the District of Columbia, and all commonwealths, territories, and possessions.

N. "Independent distributor"—Worldwide Volkswagen, Inc., Riviera Motors, Inc., Volkswagen Mid-America, Inc., and any other person, partnership, firm or corporation that distributes VWoA's vehicles to dealers on a regular basis.

O. "Engine damage due to lack of lubrication"—Claims of damage to internal engine components caused by insufficient lubrication.

P. "MQ Service Action Program"—The recall and reimbursement campaign initiated by VWoA beginning in February 1982 which included offers to replace valve stem seals and to reimburse prior valve stem seal replacement up to \$125 in 1977 through 1979 Volkswagen Rabbit and Scirocco vehicles equipped with gasoline engines.

Q. "Arbitration agreement"—The form that sets out issues to be arbitrated concerning claims relating to internal engine components as described in Rule 4 of Attachment C.

I

*It is ordered* that respondent Volkswagen of America, Inc., its successors and assigns, and their officers, representatives, agents, and employees, acting directly or through any subsidiary, division, or other device in connection with the advertising, offering for sale, sale, or distribution of any vehicle in or affecting commerce in the United States, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Failing to continue VWoA's program of issuing PSPs in a manner comparable to the program as it existed in the years 1980 through the date of service of this Order, with such program to continue to take into account current criteria used for issuing PSPs, such as the frequency with which the product condition has occurred and is expected to occur, the repair costs to the

consumer, and the significance to the consumer of the product condition; and failing to utilize information sources such as internal corporate testing and engineering programs, marketing and other surveys purchased or used by VWoA, information from the manufacturer(s) of affected vehicles or vehicle parts, and reports from customers, dealers, and independent distributors.

B. Within 30 days after the date of service of this Order, failing to prepare and issue PSP Indexes for the 1985 model year and thereafter failing to prepare and issue PSP Indexes for PSPs issued in each model year after the 1985 model year.

C. Failing to prepare and issue an entry in the PSP Index for each PSP issued, to include each such entry in an updated PSP Index, and to update cumulatively each quarter all PSP Index entries for all PSPs issued by VWoA, with each such updated PSP index to be forwarded to dealers and be available from VWoA within four months after issuance to dealers of any PSP that was not included in a prior index.

D. Failing to prepare and include an entry in the "PSP Highlights" section of the PSP Index, and reference it appropriately in the PSP Index, whenever:

(1) The PSP describes repair, maintenance, or diagnostic procedures not specifically covered in previously applicable repair manuals, either (i) where the cost of such procedures to a customer is reasonably expected to exceed the reference cost, or (ii) where the procedures are intended and designed to prevent future repair or replacement costs to a customer reasonably expected to exceed the reference cost; or

(2) The PSP describes revisions to repair, maintenance, or diagnostic procedures in an existing repair manual where the revisions are intended and designed either (i) to prevent future repair or replacement costs to a customer reasonably expected to exceed the reference cost, or (ii) to reduce such costs by an amount reasonably expected to exceed the reference cost; or

(3) The PSP describes modified (including additional, different, or upgraded) parts recommendations, where the modification is intended and designed (i) to prevent future repair or replacement costs to a customer reasonably expected to exceed the reference cost, or (ii) to reduce such costs by an amount reasonably expected to exceed the reference cost; or

(4) The PSP describes (i) information revising or updating information

contained in owner's manuals or maintenance schedules or (ii) non-repair information regarding the use and care of vehicles by vehicle owners or operators.

E. Beginning with the next model year commencing after the date of service of this Order, failing to disclose for each model year, in a clear and conspicuous manner, in each vehicle owner's manual or warranty booklet (where it shall be itemized in the Table of Contents and Index) for each of its vehicle lines,

(1) The following statement in the exact language set forth below:

#### Updated Service Information You Can Obtain

Volkswagen of America monitors product performance in the field and regularly sends to dealers the latest service information about [VW] [Audi] vehicles. Now, you too can get these bulletins.

Bulletins cover a wide variety of subjects: The proper use and care of your car; costly repairs; inexpensive repairs or adjustments which, if done early may avoid costly future repairs. Some bulletins describe repairs about new or unexpected conditions. Others describe improved repair procedures or parts improvements. All of this information can also help a qualified mechanic better service your vehicle.

Most bulletins apply to conditions affecting a small number of vehicles. Your dealer or a qualified mechanic may have to determine if a specific bulletin applies to your vehicle.

You can order any or all of these bulletins direct from Volkswagen of America or look at them at a [VW] [Audi] dealer. You can purchase a subscription to the bulletins which apply to a particular model and receive them as they are issued, or you can order an index which lists and identifies these bulletins and summarizes the most important ones. You also can order individual bulletins. However, the index is necessary to identify them.

(2) The above statement shall in addition provide at least the following information in clear and comprehensible language:

(a) Concerning indexes—(i) Indexes list each PSP, provide ordering information for individual PSPs, and are cumulatively updated quarterly.

(ii) Indexes contain plain-language highlights and summaries of PSPs describing costly repairs and designed to help prevent major repairs or containing owner use and care information.

(iii) If there is a charge for PSP indexes, it shall be credited against any charge for PSPs ordered.

(iv) When consumers order any index, they will receive the latest applicable index for the model year of the car unless they request an index for a different model year.

(b) Concerning PSPs—(i) The charge for individual PSPs, if any, and how to order them.

(c) Concerning subscriptions—(i) The charge for subscriptions and how to order them.

(ii) That subscribers are entitled to all PSPs published for a model and model year.

(3) The following statement in the exact language set forth below, which shall be made in conjunction with the statement described above, but which shall not precede disclosure of the information described in Paragraphs E (2)(a) (i) and (ii) of Section I:

#### CAUTION:

These bulletins are intended for qualified mechanics. They are not meant for the casual do-it-yourselfer.

Qualified mechanics have the equipment, tools, safety instructions, and know-how to do a job properly and safely. Improperly performed repairs or maintenance can adversely affect the safety of your vehicle, possibly leading to accident or injury. They may also impair the economy, durability or reliability of your vehicle and may void the warranty on your car. If you are not sure that you can perform a job properly and safely, you should not risk trying to do so.

F. Beginning with the next model year commencing after the date of service of this Order,

(1) Failing to include for each model year, in each vehicle owner's manual, warranty booklet, or similar literature provided with the vehicle at the time of delivery to the original retail customer a postage-paid ordering coupon to obtain a properly identified PSP index (including PSP Highlights), a PSP, or subscription; or

(2) Failing to maintain a toll-free telephone system, which number shall be clearly and conspicuously disclosed in close proximity to the information set out in Paragraph E of Section I, to enable members of the public to order PSP indexes (including PSP Highlights, PSPs, or a subscription to PSPs).

G. Failing to furnish each dealer with:

(1) Each PSP Index (including PSP Highlights) on paper or through such other medium as approved by designated representatives of the Federal Trade Commission, related to the vehicles represented by that dealership; and

(2) Each PSP; and

(3) An adequate supply of postage-paid ordering coupons for PSPs, PSP subscriptions and PSP indexes.

H. Beginning with the date of service of this Order, and once in each 6-month period thereafter, failing to recommend and urge, in writing, that each dealer shall:

(1) Provide information on how to order PSPs to anyone who requests such information;

(2) Provide members of the public with ready access to the PSPs and PSP Indexes (including PSP Highlights) furnished to such dealers, including any equipment needed to enable members of the public to read PSPs at dealerships; and

(3) Update PSP Indexes (including PSP Highlights) immediately upon receipt.

I. Beginning with the next model year after the date of service of this Order, failing to include the following statement, in the exact language set out below, clearly and conspicuously on the face of the label required by the "Automobile Information Disclosure Act," 15 U.S.C. 1231 *et seq.*, (1980) (as amended) on each vehicle distributed by VWoA in the United States:

"UPDATED SERVICE INFORMATION—NOW YOU CAN GET USEFUL BULLETINS AND EASY-TO-READ SUMMARIES TO SERVICE YOUR CAR BETTER AND HELP AVOID COSTLY REPAIRS. THESE ARE THE SAME BULLETINS WE SEND YOUR DEALER. SEE YOUR DEALER'S INDEX OF PRODUCT CIRCULARS FOR DETAILS."

J. Beginning with the next model year after the date of service of this Order, failing to include the following statement, in the exact language set out below, clearly and conspicuously, in each principal point of sale catalog distributed by Volkswagen of America for each of its vehicle lines:

#### A Word About Updated Service Information

[Volkswagen] [Audi] regularly sends its dealers useful service information about our products. [Volkswagen] [Audi] monitors product performance in the field. We then prepare bulletins for servicing our products better and helping to avoid costly repairs. Now you can get these bulletins, too. To get ordering information, see a local [VW] [Audi] dealer.

K. Failing to include detailed information regarding the third-party arbitration program described in Sections III and IV, and the PSP program described in this section, in all ongoing and future training programs and in materials disseminated to dealers on subjects related to customer relations, beginning not later than one hundred eighty (180) days after service of this

Order and continuing for the duration of this Order.

## II

It is further ordered, that:

A. Beginning with the date of service of this Order, upon written request by any person, VWoA shall mail or cause to be mailed, by first class mail, the following:

(1) Information describing PSPs, PSP Indexes, and PSP subscriptions, as well as how to obtain PSPs, PSP Indexes and PSP subscriptions;

(2) The most current PSP Index, *Provided That*, the "PSP Highlights" in the PSP Index may be limited to the particular vehicle make, model and model year identified in the request;

(3) Any specifically identified PSPs;

(4) Subscriptions to all PSPs.

B. Subject to the limitations of this section, VWoA may, at its option, impose a reasonable charge for PSPs, PSP Indexes and PSP subscriptions. Any charge for a PSP Index must be credited toward the initial purchase of PSPs themselves. The maximum charges shall be as follows:

(1) For PSP Indexes ordered:

(a) Model years prior to 1988, no charge;

(b) Through 1990, a charge not to exceed two dollars (\$2.00) for any PSP Index;

(c) For years 1991 and thereafter, a charge not to exceed three dollars (\$3.00) for any PSP Index.

(2) For individual PSPs, a charge not to exceed four dollars (\$4.00) for the first PSP requested in each order and two dollars (\$2.00) for each additional PSP requested in that order;

(3) For PSP subscriptions, a charge not to exceed the lower of the reasonable cost or the charge (if any) to dealers.

C. VWoA may offer subscriptions of any duration, *Provided That*, VWoA offers the option of a subscription with a one-year duration.

## III

It is further ordered that:

A. VWoA shall make available in the United States to claimants an arbitration program, which shall be administered through an independent and impartial third party, to resolve expeditiously and fairly (1) each specified claim regardless of time in service, mileage, or whether the claimant still owns or leases the vehicle; and (2) each claim made or renewed after the date of service of this order by owners and lessees (unless the lessor bore the cost of the claim) of any Volkswagen or Audi vehicle distributed by VWoA, warranted in writing by VWoA, or certified by the manufacturer

to the responsible Federal agencies as meeting applicable Federal safety and emission standards involving the claimed failure, malfunction, repair or replacement of internal engine components while the claimant owns or leases the vehicle, regardless of time in service or mileage.

*Provided, however*, that VWoA need not make the arbitration program described above available to claimants:

(1) For claims involving repairs required to place in operating condition an engine which was not operable when the vehicle was purchased or leased by an owner or lessee, other than the original retail purchaser or original lessee; or

(2) For claims involving internal engine components:

(a) Whose claims were the subject of a claim by a prior owner or lessee which was settled or resulted in an arbitration award which the prior owner or lessee accepted; or

(b) If the claimant sells the vehicle prior to sixty days after the claimant notified the independent and impartial third party administrator of the claim, unless the claimant does the following:

(i) Notifies VWoA in writing at least ten days before the vehicle is disposed of; and

(ii) Gives VWoA an opportunity to inspect the vehicle at a mutually convenient time and place.

B. The decision of the arbitrator shall be binding on VWoA, but non-binding on the claimant, unless the claimant elects to accept an arbitration award.

C. (1) With respect to specified claims, such third-party arbitration program shall be conducted in accordance with the Modified Rules for Arbitration published by the Council of Better Business Bureaus as specially modified and set forth in Attachment D, and

(2) With respect to claims relating to internal engine components, such third-party arbitration program shall be conducted in accordance with the Modified Rules for Arbitration published by the Council of Better Business Bureaus as specially modified and set forth in Attachment C.

*Provided, however*, the Rules for Arbitration may be modified only with the written approval of designated representatives of the Federal Trade Commission.

D. For two years after the date of service of this order, such third-party arbitration program shall be conducted at no charge to the claimant by VWoA or the independent and impartial third-party administrator. Thereafter, no charges shall be imposed on claimants by VWoA or the independent and impartial third-party administrator that

exceeds charges specified in the Modified Rules for Arbitration published by the Council of Better Business Bureaus.

E. No settlement of or judgment on the merits in a class action lawsuit shall affect a claimant's right to request arbitration of a specified claim or claim relating to internal engine components under this Order, *Provided that*, a specified claim or claim relating to internal engine components is not eligible for arbitration if:

(1) The claimant received actual notice of the pendency or settlement of the class action; and

(2) The notice of pendency and, if applicable, settlement of such class action was approved by designated representatives of the Federal Trade Commission prior to submission of the notice to the court by VWoA, as fully, accurately, clearly and conspicuously disclosing the availability of the arbitration program described in Sections III and IV; and

(3) The claimant did not request exclusion from the class action or settlement, or the claimant received payment pursuant to the class action settlement or judgment on the merits;

*Provided, However*, that arbitration shall continue to be available during the pendency of the class action proceeding until settlement or judgment is entered on the merits, regardless of whether the claimant requested exclusion from the proceeding.

F. Such third-party arbitration program shall be fully operational pursuant to the terms of this order no later than forty-five (45) days after the date of service of this Order, and thereafter expanded as demands on the program may require to resolve consumer complaints expeditiously.

G. VWoA shall, by first class mail, mail or cause to be mailed Attachment G in response to any claimant with a claim relating to internal engine components, within thirty days after receipt of such claim, unless the claimant's request for repair or reimbursement or other compensation is fully met.

H. Notwithstanding any other provision of this Order, the mediation and arbitration program described in Sections III and IV shall be available to members of the armed forces stationed at military installations located outside the United States and their dependents. *Provided, however*, that only arbitration by mail must be available as long as such claimants are located outside the United States.

## IV

*It Is Further Ordered that:*

A. Prior to sixty (60) days after the date of service of this Order, VWoA shall contact, by first-class mail, each attorney general's office (or such other office as may be appropriate) of the fifty states, the District of Columbia, commonwealths, territories and possessions, and shall:

(1) Provide each such office with a copy of this Order.

(2) Describe in such mailing VWoA's third-party arbitration program.

(3) Describe in such mailing the PSPs and PSP Indexes and explain how consumers can obtain them.

(4) Inform each such office that VWoA will, if the appropriate office wishes, within fifteen days after receipt from such office or sixty days after the date of service of this order, whichever is later, notify by first-class mail each person who has complained to that office about a specified claim, and that VWoA will provide that person in the same mailing envelope with:

(a) Information about the availability of VWoA's third-party arbitration program; and

(b) One or more of the appropriate Background Statements as required to be distributed pursuant to Paragraph B of Section IV in connection with any specified claim.

(5) Request that each such office provide VWoA with (a) a copy of each complaint that may include a specified claim; or, at the option of that office, (b) the owner's name and address, and the nature of the specified claim.

(6) Inform each such office that VWoA will also send, by first-class mail, a notice to any person who has complained to any other state or local law enforcement or consumer affairs office about a specified claim, and urge such office to encourage state and local law enforcement or consumer affairs offices to forward to VWoA either copies of such complaints, or, at the option of the forwarding office, a list of the names, and addresses of persons with specified claims and the amount and nature of each such claim, if known.

B. For purposes of Paragraph B of Section IV only:

—A "claim" has been made if, for any oral or written request for reimbursement or repair, a document was created or received by VWoA or any of its independent distributors, including, but not limited to, warranty records, consumer letters, dealer reports, or records of telephone complaints;

—"Open or unsatisfactorily resolved" claims are any claims for which the

claimant did not receive all payments or free repairs claimed or requested.

VWoA shall send by first class mail Attachments A (or A100, if the vehicle was an Audi 100), B (or B100 if the vehicle was an Audi 100), E (2) and F, and a postage-paid return envelope, or, if VWoA wishes to make an initial settlement offer, Attachments A (or A100 if the vehicle was an Audi 100), B (or B100 if the vehicle was an Audi 100), E(1) and F, and a postage-paid return envelope to the following:

(1) Every claimant who, prior to the [date of service of this Order], had made a specified claim to VWoA that is open or unsatisfactorily resolved or who, prior to the [date of service of this Order] notified VWoA's independent distributors of such claim(s);

(2) every claimant who has received reimbursement of \$125 under VWoA's MQ service action program, and who submitted repair orders or other documentation showing that one or more of the following repairs occurred at a total expense of more than \$125.00 which has not been fully reimbursed as of the date of service of this Order:

(a) Cylinder head replacement;  
(b) Any repair involving cylinder head removal and valve repair;  
(c) Replacement of the engine short block;  
(d) Replacement of any one or more of the following:

(i) Crankshaft;  
(ii) Connecting rod(s);  
(iii) Main bearing(s);  
(iv) Connecting rod bearing(s);  
(v) Pistons;  
(vi) Piston rings.

(3) Every claimant with a specified claim whose name had been supplied to VWoA by the offices referred to in Paragraph A of Section IV, the Federal Trade Commission, or any other consumer affairs office or any third party, and whose specified claim remains open or unsatisfactorily resolved prior to the date of service of this Order.

(4) Every claimant with a specified claim which is open or unsatisfactorily resolved whose name will have been supplied to VWoA after the date of service of this Order by the offices referred to in Paragraph A of Section IV, the Federal Trade Commission, or any other consumer affairs office or any third party; and

(5) Every claimant with a specified claim which is open or unsatisfactorily resolved who, orally or in writing, contacts VWoA, any office of the independent and impartial third party administrator, or VWoA's independent distributors after [the date the

Commission accepts this Order for comment].

*Provided, however,* that for any mailing made pursuant to this section which is returned to the sender as being undeliverable, VWoA shall make a reasonable attempt to obtain the claimant's current address, and shall send the mailing by first class mail to the claimant's current address; *Provided, further,* Attachments A and B or Attachments A100 and B100, as applicable, shall be fastened or otherwise physically attached with Attachment B (or Attachment B100) on top of Attachment A (or Attachment A100).

C. The following deadlines shall apply:

(1) For initially mailing the materials specified in Paragraph B of Section IV:

(a) With respect to claimants included in Paragraphs (B) (1), (2) and (3) of Section IV, all materials shall be mailed according to the following schedule:

(i) Not less than 25% of the total number shall be mailed within 15 days of the date of service of this order;

(ii) Not less than 50% of the total number shall be mailed within 45 days of the date of service of this order;

(iii) Not less than 75% of the total number shall be mailed within 75 days of the date of service of this Order; and

(iv) 100% of the total number shall be mailed within 90 days of the date of service of this Order.

(b) With respect to claimants included in Paragraphs (B) (4) and (5) of Section IV, whose claims are not included in Paragraph (B) (1), (2) or (3) of Section IV, all materials shall be mailed within fifteen days after receipt by VWoA, the independent and impartial third party administrator, or VWoA's independent distributors of the name and address of the claimant, or sixty days after the date of service of this order, whichever is later.

(2) For the handling of specified claims:

(a) (i) Claimants who accept settlement offers shall be sent the applicable monetary amount within forty-five (45) days after the settlement offer acceptance is received by VWoA;

(ii) Claimants who accept arbitration awards shall be sent the applicable monetary amount within forty-five (45) days after the arbitration award acceptance is received by the independent and impartial third party administrator.

(b) (i) Any applicable repair shall be performed within thirty (30) days after the settlement offer acceptance is received by VWoA;

(ii) Any applicable repair shall be performed within thirty (30) days after the arbitration award acceptance is received by the independent and impartial third party administrator, except as otherwise ordered by the arbitrator for good cause shown.

(c) Claimants who request to participate in the independent and impartial third party arbitration program by returning the "Response to Volkswagen Mediation and Arbitration Program" form included with Attachment E (1) or (2), shall have an arbitration hearing completed within 60 days after the "Response to Volkswagen Mediation and Arbitration Program" form included in Attachment E (1) or (2) is received by VWoA, regardless of whether the claimant requests mediation services.

*Provided, however,* that delays attributable solely to the claimant shall not be included in the calculation of deadlines. The burden of proving that the delay is attributable solely to the claimant shall be on VWoA;

(3) For claims involving internal engine components that do not involve specified claims:

(a) An arbitration hearing shall be completed within sixty (60) days after the claimant provides the independent and impartial third party administrator with the model, model year, and Vehicle Identification Number of the vehicle and a statement describing the nature of the complaint, regardless of whether the claimant requests mediation services.

*Provided, however,* that delays attributable solely to the claimant shall not be included in the calculation of deadlines. The burden of proving that the delay is attributable solely to the claimant shall be on VWoA;

(b)(i)(1) Claimants who accept settlement offers shall be sent the applicable monetary amount within forty-five (45) days after the settlement offer acceptance is received by VWoA;

(2) Claimants who accept arbitration awards shall be sent the applicable monetary amount within forty-five (45) days after the arbitration award acceptance is received by the independent and impartial third party administrator;

(ii)(1) Any applicable repair shall be performed within thirty (30) days after the settlement offer acceptance is received by VWoA;

(2) Any applicable repair shall be performed within thirty (30) days after the arbitration award acceptance is received by the independent and impartial third party administrator, except as otherwise ordered by the arbitrator for good cause shown.

D. Claimants with specified claims may not be required to fill out any other form to request an arbitration hearing once they have checked Choice 2 or 3 on the form included with Attachment E(1) or Choice 1 or 2 on the form included with Attachment E(2).

E. VWoA may not request a claimant who accepts an offer to settle a specified claim to execute a statement releasing VWoA from further liability if the statement purports to release VWoA from liability that, at the time the claim was settled, would not have been subject to arbitration as described in Sections III and IV.

F. Within thirty (30) days of service of this Order, VWoA shall provide to its independent distributors and appropriate employees of VWoA, including employees who have responsibility for receiving and responding to consumer complaints, written instructions stating that all consumers who make a specified claim in any oral or written communication received after the date of service of this Order must be sent, by first-class mail, a letter providing the documents specified in Paragraph B of Section IV, above, within fifteen days, or sixty days after the date of service of this order, whichever is later.

G. VWoA may make an immediate binding settlement of a specified claim prior to the initiation of mediation or arbitration, *Provided that*, prior to the settlement, the claimant received all of the materials required to be sent to the claimant pursuant to Paragraph B of Section IV (either Attachments E(1) or E(2) (Cover letter) and Attachments A (or A100, as applicable), B (or B100, as applicable) (Background Statements), and F (BBB specified claim brochure)).

H. All envelopes sent pursuant to Paragraph B of Section IV shall bear no marking, other than the name and address of VWoA and the addressee, and the words "Important Reimbursement Information" disclosed conspicuously on the front.

I. VWoA shall offer to each claimant at the outset of each arbitration hearing all of the materials required to be sent to the claimant pursuant to Paragraph B of Section IV (either Attachments E(1) or E(2) (Cover letter) and Attachments A (or A 100, as applicable), B (or B100, as applicable) (Background Statements), and F (BBB specified claim brochure)).

J. VWoA shall obtain, maintain, and retain for a period of three (3) years from the date of resolution of each claim, records sufficient to show to the satisfaction of designated representatives of the Federal Trade Commission:

(1) For each specified claim:

(a) The following dates as applicable:

(i) The date VWoA received the claimant's name and address, if the specified claim was received by VWoA pursuant to Paragraph B (4) and B (5) of Section IV.

(ii) The date the materials described in Paragraph B of Section IV were mailed;

(iii) The date each written response was received by VWoA from the addressee of Attachment E(1) or E(2);

(iv) The date an arbitration hearing was scheduled;

(v) The date the arbitration hearing was completed;

(vi) The date the arbitrator's decision was received by the independent and impartial third-party administrator;

(vii) The date(s) VWoA made each offer to settle the claim;

(viii) The date the claimant accepted or rejected each settlement offer;

(ix) The date the claimant accepted or declined the arbitrator's award;

(x) The date a check was sent to satisfy an arbitration award or settlement agreement.

(xi) The date scheduled for any repair offered as a result of an arbitration award or settlement agreement.

(xii) The date any repair offered as a result of an arbitration award or settlement agreement was actually performed.

(b) The following documents and information, as applicable:

(i) The vehicle model;

(ii) The vehicle model year;

(iii) The vehicle identification number;

(iv) A brief description of the alleged problem, including whether the claimant included information suggesting that excessive oil consumption or engine damage due to lack of lubrication might be involved;

(v) The resolution(s) sought by the claimant: repair, cash reimbursement or vehicle repurchase;

(vi) The amount, if any, of cash reimbursement sought;

(vii) The terms of each offer, if any, made by VWoA to settle the claim;

(viii) The response of the claimant to each settlement offer;

(ix) A copy of each arbitrator's decision including the amount of any cash reimbursement;

(x) Whether the claimant accepted the arbitrator's award;

(xi) The name and address of each claimant who owned or leased a covered vehicle, and requested to participate in the mediation and arbitration program set forth in Section III and IV, and was refused the opportunity to participate in the mediation and arbitration program.

(xii) The reason(s) each claimant described in Paragraph J(1)(a)(xi) of Section IV was determined not to have a specified claim.

(xiii) The reason(s) known to VWoA or the independent and impartial third party administrator for the failure to resolve a claim other than by settlement or an arbitration decision;

(xiv) If the claim is settled, whether a third-party mediator actively participated in settlement discussions.

(xv) A copy of the "Response to Volkswagen Mediation and Arbitration Program" form completed by the claimant;

(c) The name and address of each claimant who contacts orally VWoA, the independent and impartial third-party administrator, or VWoA's independent distributors and states facts that suggest that the claimant may have a specified claim.

(2) For each mediation or arbitration of a claim involving an internal engine component:

(a) The following dates, as applicable:

(i) The date VWoA mailed Attachment G, described in Paragraph G of Section III;

(ii) The date the claimant first contacted the independent and impartial third-party administrator;

(iii) The date the independent and impartial third-party administrator received from the claimant the model, model year, Vehicle Identification Number of the vehicle and a statement describing the nature of the claim;

(iv) The date VWoA was notified by the independent and impartial third-party administrator that a claim involving internal engine components had been lodged;

(v) The date the arbitration agreement was sent to the claimant;

(vi) The date the arbitration agreement was received from the claimant by the independent and impartial third-party administrator;

(vii) The date the initial arbitration hearing was scheduled;

(viii) The date the initial arbitration hearing was completed;

(ix) The date the arbitration decision was mailed to the claimant;

(x) The date the claimant accepted or rejected each settlement offer from VWoA;

(xi) The date the claimant accepted or rejected an arbitration award.

(b) The following information:

(i) The vehicle model;

(ii) The vehicle model year;

(iii) The vehicle identification number;

(iv) A brief description of the problem alleged;

(v) The resolution(s) sought by the claimant: repair, cash reimbursement or vehicle repurchase;

(vi) The amount, if any, of cash reimbursement sought;

(vii) The terms of each offer, if any, by VWoA to settle the claim before the claimant contacted the independent and impartial third-party administrator;

(viii) The terms of each offer, if any, by VWoA to settle the claim after the claimant contacted the independent and impartial third-party administrator;

(ix) The response of the claimant to each settlement offer;

(x) A copy of each arbitrator's decision including the amount of any cash reimbursement;

(xi) Whether the claimant accepted or rejected the arbitrator's award;

(xii) The reason(s) for the failure to resolve a claim other than by settlement or an arbitration decision;

(xiii) If the claim is settled, whether a third-party mediator actively participated in settlement discussions.

(xiv) A copy of the arbitration agreement.

(xv) The name and address of each claimant, who requested the opportunity to participate in the third-party mediation and arbitration program set forth in Sections III and IV, and was refused the opportunity to participate in said mediation and arbitration program.

(xvi) The reasons each claimant specified in Paragraph J(2)(b)(xv) was determined not to be eligible to participate in the mediation and arbitration program set forth in Sections III and IV.

(3) Computer disks, tapes or other computer-readable media created or maintained by VWoA, on behalf of VWoA, or by the independent and impartial third party administrator that contain any information specified in Paragraphs J(1) and J(2) of Section IV, and necessary relevant programming and other explanatory data sufficient to enable the Federal Trade Commission to read and analyze the data contained on such media.

## V

*It is further ordered that:*

A. At least two times, at least one month apart, within 120 days after the date of service of this order, VWoA shall place and cause to be disseminated the advertisement attached as Attachment H(1) in national magazines as full-page advertisements. At least two times, at least one month apart, within 120 days after the date of service of this order, VWoA shall place and cause to be disseminated the advertisement attached as Attachment H(2) in national magazines as full-page

advertisements. Each time Attachment H(1) is placed and each time Attachment H(2) is placed, the magazines must have a combined total non-duplicated readership ("net reach") of at least seventy-five million adults as measured by an outside organization generally recognized as competent and experienced in this field and used by VWoA or its advertising agencies for other advertising research. The demographic characteristics for the combined total readership of the magazines selected for such advertisements must be generally representative of the demographic characteristics of the population of owners and potential purchasers of Volkswagen vehicles (for Attachment H(1)) and Audi vehicles (for Attachment H(2)).

B. Beginning with the next model year commencing after the date of service of this Order, VWoA shall annually include in any edition of each proprietary magazine sent by VWoA to a primary target audience of VWoA's vehicle owners:

(1) The statements set forth in Paragraph J of Section I set forth clearly and conspicuously; and

(2) A full page reproduction of Attachment H(1) for Volkswagen owners, or Attachment H(2) for Audi owners, as applicable.

C. Within thirty days after the date of service of this Order, VWoA shall furnish to each of its dealers three display posters, with the form and content of Attachment I(1) (for Volkswagen dealers) or I(2) (for Audi dealers), each at least 24" x 36". Thereafter, VWoA shall furnish additional copies of these posters upon request by any dealer.

D. Beginning with the date of service of this Order, and once in each 6-month period thereafter, VWoA shall recommend and urge, in writing, that each dealer shall:

(1) Place the display poster, described in Paragraph C of Section V, in conspicuous and accessible locations within:

(a) Service waiting areas; and

(b) Parts departments; and

(c) Service payment areas.

E. (1) Within five (5) days after the date of service of this Order, VWoA shall establish and maintain a toll-free telephone system which will elicit information to enable current and former owners and current and former lessees to enter the independent and impartial third-party arbitration programs set forth in Sections III and IV. The toll-free telephone system shall have sufficient capacity to enable each

call made by owners and lessees to be answered reasonably promptly. Each caller shall be requested to furnish the following information, which shall be documented:

(a) Name, address and telephone number of the caller;

(b) Model and model year of the vehicle;

(c) Nature of the claim, including sufficient information to ascertain whether a specified claim is alleged, and, if so, whether the specified claim includes an allegation of engine damage from lack of lubrication.

(d) The date of the call.

(2) Each caller to the toll-free number described in Paragraph E(1) of Section V shall also (a) be informed that, if the caller states facts suggesting that a specified claim may be involved, that VWoA will mail a letter describing the third-party arbitration program to the caller; or (b) if the caller states no facts suggesting that the claim may be a specified claim, the caller shall be informed of the toll-free telephone number (or "call collect" number, as applicable), of the local office of the independent and impartial third-party administrator.

F. Beginning with the next model year commencing after the date of service of this Order, VWoA shall include the following information, in a clear and conspicuous manner, in each vehicle owner's manual or warranty booklet (where it shall be itemized in the Table of Contents and Index):

(1) A description of the mediation and arbitration program for internal engine components required by Sections III and IV;

(2) An explanation of how the owner or lessee can enter the mediation and arbitration program;

(3) A description of applicable time deadlines as set forth in Paragraph C(3) of Section IV;

(4) The toll-free telephone number described in Paragraph E of Section V.

(5) A statement that there is no charge to the consumer for participating in the program, if such is the case, or a statement of any charges to the consumer for participating in the program; and

(6) A statement that the arbitration award is binding on VWoA, but is not binding on the consumer, unless the consumer elects to accept the arbitration award.

G. (1) Within 30 days after the date of service of this Order, VWoA shall prepare and issue a PSP which includes the following information:

(a) A description of the mediation and arbitration program for internal engine

components required by Sections III and IV;

(b) An explanation of how the owner or lessee can enter the mediation and arbitration program;

(c) A description of applicable time deadlines as set forth in Paragraph C(3) of Section IV;

(d) The toll-free telephone number described in Paragraph E of Section V;

(e) A statement that there is no charge to the consumer for participating in the program, if such is the case, or a statement of any charges to the consumer for participating in the program; and

(f) A statement that the arbitration award is binding on VWoA, but is not binding on the consumer, unless the consumer elects to accept the arbitration award.

(2) The PSP referred to in Paragraph G(1) of Section V shall, during the term of this order, be included with each PSP index ordered.

## VI

*It is further ordered* that Sections I, II, III, IV, and V of this Order shall expire eight years after the date of service hereof; *Provided*, That if at any time during which said sections remain in effect, the Commission issues a final trade regulation rule imposing obligations on the automobile industry comparable to those imposed under any such section(s), such section(s) shall terminate upon the effective date of such rule, and, in such event, VWoA shall advise the Commission of its intention to rely upon any such rule as having terminated and superseded such section(s) of this Order thirty (30) days in advance of reliance thereon: *Provided Further*, that if at any time during which such section(s) remain in effect the Commission issues a final guide under Sections 1.5 and 1.6 of the Commission's Rules of Practice imposing obligations on the automobile industry comparable to those imposed under any such section(s), then the Commission shall, upon VWoA motion or upon the Commission's own motion, reopen this proceeding within one hundred twenty (120) days of such motion, and, within a reasonable time thereafter, vacate any such section(s) of this Order, unless the Commission finds that such action is not required by changed conditions of law or fact or is not in the public interest; and *Provided Further*, that nothing herein shall preclude VWoA at any time from moving the Commission to alter, modify, or set aside this Order under the Commission's Rules of Practice.

## VII

*It is further ordered* that:

A. VWoA shall, within one hundred twenty (120) days after the date of service of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

B. VWoA shall, within one hundred twenty (120) days after the implementation of the PSP program described in Sections I and II of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which VWoA has complied with Sections I and II of Order.

C. VWoA shall, upon request of designated representatives of the Federal Trade Commission, but no more frequently than every one-hundred eighty days, while Sections III and IV of this Order are in effect, file with the Commission a report compiling and summarizing data describing settlements, mediations, and arbitrations and accompanying deadlines undertaken pursuant to Sections III and IV which have occurred since the previous such report had been completed. Such report shall include accurate summaries of the data required to be kept pursuant to Paragraph J of Section IV. VWoA shall also transmit to the Commission upon request the computer media and explanatory and programming information required by Paragraph J(3) of Section IV.

D. VWoA shall retain and transmit to the Commission upon reasonable request:

(1) A copy of each PSP Index required by Section I, and a copy of each PSP;

(2) A copy of each poster furnished to dealers pursuant to Paragraph C of Section V.

E. VWoA shall, on a bi-annual basis beginning 6 months after the date of service of this Order, monitor and document, based on the personal observations of VWoA or independent distributor employees, each dealer's compliance with the items set forth in Paragraph H of Section I above and Paragraph D of Section V above, *Provided, However*, that VWoA shall not be required to monitor and document the compliance with Paragraph H of Section I and Paragraph D of Section V by a dealer if no employee of VWoA or an independent distributor has visited that dealer within the previous six-month-period to review the dealer's sales, service, or customer relations activities.

F. VWoA shall retain records relative to the manner and form of its continuing compliance with Sections I, II, III, IV, V and VI for a period of three (3) years, and shall make said records available

for inspection upon reasonable notice by the Federal Trade Commission. If copies of any such records are requested, VWoA may, at its option, either make such records available for copying purposes or provide copies at either (1) rates the Commission charges for copies of records released pursuant to the Freedom of Information Act, or (2) VWoA's costs, whichever is lower.

G. Upon request by the Federal Trade Commission, VWoA shall obtain and make available to the Federal Trade Commission in the English language within forty-five days after the request any records relevant to Paragraph A of Section I in the possession of the manufacturer of any vehicles, engines or transmissions which VWoA imports or distributes; *Provided, However*, that submission of such records shall neither constitute nor be deemed an admission by any entity from which they are obtained of *in personam* jurisdiction of the Commission over such entity; *Provided Further*, that nothing in this section shall be construed to affect the Commission's access to any records, documents, or other information pursuant to compulsory process or other means.

H. VWoA shall take all necessary legal and equitable action to enforce promptly and in good faith its contractual or other rights to obtain records requested by the Federal Trade Commission pursuant to Paragraph G of Section VII.

I. During the time that Sections I, II, III, IV and V remain in effect, VWoA shall notify the Commission prior to any change in VWoA's corporate structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order.

#### VIII

*It is further ordered* that the provisions of this Order shall be limited in their application to the United States.

#### IX

*It is further ordered* that the complaint against Volkswagen AG, a corporation, is hereby dismissed.

#### Attachment A—Background Statement

##### Oil Usage

##### Background

This case may involve an owner's complaint about excessive oil use in a gasoline-fueled 1974-1979 [Volkswagen water-cooled engine] [Audi Fox or 5000].

Since 1981, the Federal Trade Commission (FTC) and [Volkswagen (VW)] [Volkswagen of America, the importer of Audi vehicles (Audi)] have been involved in an administrative lawsuit about allegations of excessive oil use in 1974 to 1979 [VW cars with water-cooled gasoline engines] [Audi Fox and 500 vehicles]. The FTC has alleged that VW failed to tell consumers about an "abnormally high" number of engine problems related to excessive oil consumption in these vehicles. [VW] [Audi] has denied this claim and has stated that it has at all times provided owners with more than sufficient information to operate and maintain their vehicles safely and economically. [VW] [Audi] and the FTC have now agreed to settle this dispute without further litigation.

As part of their settlement of this dispute, [VW] [Audi] and the FTC have agreed to allow such complaints to be submitted to mediation and arbitration. They have prepared this information sheet to give consumers, mediators and arbitrators potentially useful background facts. Some of these facts may not be widely known.

##### Oil Usage

Like all automobile engines, the water-cooled engines in 1974-1979 [Volkswagen] [Audi] vehicles use lubricating oil to perform several vital functions. The rate of oil usage may vary widely, generally depending on several factors, including the design of the engine, its age and mechanical condition, the viscosity (or thickness) and quality of oil used, the maintenance and care given to the vehicle and the driving habits of the operator.

Internal oil consumption in gasoline-powered automobile engines usually occurs in one or more of three areas: Past the "valve stem seals," past the piston rings, or through the "crankcase breather system." Sometimes, internal oil burning is evidenced by smoke coming from the tailpipe, but at other times no smoke is visible. At other times, tailpipe smoke may result from causes unrelated to oil consumption.

Automobile engineers do not agree on what precise rate of oil consumption is acceptable. Usually, however, gasoline automobile engines use slightly more oil during the initial break-in period of 5,000 to 10,000 miles than they will later. Then, until at least 50,000 miles, engines in good condition should have a roughly even rate of oil consumption, which can increase gradually because of normal wear and tear on internal engine parts. A sudden increase in oil consumption, or a substantial increase when the car has been driven less than 50,000 miles,

usually means that a component has failed, the operator's driving habits have changed, or that maintenance or care habits have been altered.

In controlled engineering tests conducted by [Volkswagen]-[Audi] and others on prototype and production engines and complete vehicles, mechanically sound engines, tested over 50,000 miles or more used one quart or less of oil every 1,000-2,000 miles. Nevertheless, some water-cooled engines in 1974-1979 [VW] [Audi] vehicles have experienced higher rates of oil consumption in actual customer use.

The FTC claims that "high rates of oil consumption" were abnormally frequent in water-cooled gasoline fueled 1974-1979 [VW] [Audi] vehicles and that in cases where substantially increased rates of oil use have occurred at less than 50,000 miles in such vehicles, the most common cause of such increase has been leakage past failed valve stem seals.

[VW] [Audi] denies this claim and states that these vehicles in customer hands have experienced, on a worst case basis, a fleet average oil consumption rate, from whatever causes, of several thousand miles per quart.

In mid-1979, [VW] [Audi] introduced a new valve stem seal using an improved material [in the Fox and 5000]. As is customary, the improved part was used for both original equipment and replacement parts.

The FTC contends that [VW's] [Audi's] 1979 valve stem seal change was made to alleviate the alleged excessive oil consumption in these vehicles.

[VW] [Audi] denies that this change was in any way different from the thousands of upgrades and improvements continually made to its vehicles on an ongoing basis.

If increased oil consumption in an individual vehicle does occur past the valve stem seals, replacement of the seals is the appropriate repair. Valve stem seals can be replaced alone. Valve stem seals are also replaced routinely, whenever a cylinder head is replaced or if a "valve job" is performed. Cylinder head replacement and valve jobs are more extensive repairs than valve stem seal replacement, alone. [Volkswagen] [Audi] dealers and independent mechanics have replaced cylinder heads and performed valve jobs in some cases in response to owner complaints of excessive oil usage on 1974-1979 [VW] [Audi Fox and 5000] vehicles.

The FTC claims that excessive oil consumption was abnormally frequent

on these vehicles, and most often resulted from failed valve stem seals, and that VW did not inform consumers and dealers of this problem. The FTC also contends that consumers and dealers were not told that valve stem seal replacement, alone, usually corrected the increased oil consumption. The FTC further claims that because mechanics had not been told this information, competent mechanics may have performed cylinder head replacements and valve jobs when valve stem seal replacement, alone, would have corrected the problem.

[VW] [Audi] denies that oil consumption or valve stem seal performance in its engines was in any way abnormal. VW further states that its owner's and service publications have at all times provided customers with specific guidelines for identifying potential problems and dealers with the latest and most cost-effective procedures to diagnose and repair them properly. [VW] [Audi] therefore denies that competent mechanics have ever either misdiagnosed or deliberately overrepaired minor and simple conditions such as valve stem seal replacement, except in isolated cases.

Normally, it is reasonable to expect valve stem seals in a properly maintained and used engine to provide reliable, durable service substantially beyond the warranty period. Claims of oil consumption related to alleged valve stem seal failure most often have occurred, in fact, after the expiration of the warranty.

Proper maintenance and use of a vehicle are important to the durability and reliability of all parts of an automobile engine, including valve stem seals. The manufacturer spells out in the owner's manual recommended maintenance procedures, and discloses driving habits which should be avoided. However, valve stem seals have failed prematurely on some 1974-1979 [VWs] [Audi Foxes and 5000s] even with proper maintenance and use.

[Volkswagen's] [Audi's] limit for maximum permissible oil consumption in these vehicles is [Volkswagen: 2.5 qts./1,000 miles] [Audi: 2.5 qts./1000 miles for the Audi Fox and 2.9 qts./1000 miles for the Audi 5000]. The owner's manuals for 1977-1979 model year water-cooled [VW vehicles] stated that "oil consumption can be up to 2.5 U.S. quarts per 1000 miles." [Audi Fox vehicles] stated that "oil consumption can be up to 2.5 qts./1000 miles (2.9 qts./1000 miles for the 5000)." These figures, however, are not a statement of expected normal or average oil consumption in these vehicles.

#### [Volkswagen's] [Audi's] Warranty

[Volkswagen] [Audi] provides a limited warranty with each new [Volkswagen] [Audi] vehicle sold by one of its dealers. The warranty generally covers any repair and adjustment needed to correct defects in materials and workmanship within the warranty period. However, complaints may occur after the warranty. A manufacturer's warranty is not necessarily the manufacturer's only responsibility, and should not determine the outcome of this case. Likewise, [Volkswagen's] [Audi's] field guide for maximum permissible oil consumption need not dictate the outcome of this case.

#### Attachment A100—Background Statement

##### *Oil Usage*

##### Background

This case may involve an owner's complaint about excessive oil use in a gasoline-fueled 1974-1977 Audi 100LS vehicle.

Since 1981, the Federal Trade Commission (FTC) and Volkswagen of America, the importer of Audi vehicles, (Audi) have been involved in an administrative lawsuit about allegations of excessive oil use in 1974 to 1979 Audi cars with water-cooled gasoline engines. The FTC has alleged that Audi failed to tell consumers about an "abnormally high" number of engine problems related to excessive oil consumption in these vehicles. Audi has denied this claim and has stated that it has at all times provided owners with more than sufficient information to operate and maintain their vehicles safely and economically. Audi and the FTC have now agreed to settle this dispute without further litigation.

As part of their settlement of this dispute, Audi and the FTC have agreed to allow such complaints to be submitted to mediation and arbitration. They have prepared this information sheet to give consumers, mediators and arbitrators potentially useful background facts. Some of these facts may not be widely known.

##### *Oil Usage*

Like all automobile engines, the water-cooled engines in 1974-1977 Audi 100 vehicles use lubricating oil to perform several vital functions. The rate of oil usage may vary widely, generally depending on several factors, including the design of the engine, its age and mechanical condition, the viscosity (or thickness) and quality of oil used, the maintenance and care given to the

vehicle and the driving habits of the operator.

Internal oil consumption in gasoline-powered automobile engines usually occurs in one or more of three areas: Past the valve guides and the "valve stem seals," past the piston rings, or through the "crankcase breather system." Sometimes, internal oil burning is evidenced by smoke coming from the tailpipe, but at other times no smoke is visible. At other times, tailpipe smoke may result from causes unrelated to oil consumption.

Automobile engineers do not agree on what precise rate of oil consumption is acceptable. Usually, however, gasoline automobile engines use slightly more oil during the initial break-in period of 5,000 to 10,000 miles than they will later. Then, until at least 50,000 miles, engines in good condition should have a roughly even rate of oil consumption, which can increase gradually because of normal wear and tear on internal engine parts. A sudden increase in oil consumption, or a substantial increase when the car has been driven less than 50,000 miles, usually means that a component has failed, the operator's driving habits have changed, or that maintenance or care habits have been altered.

In controlled engineering tests conducted by Audi and others on prototype and production engines and complete vehicles, mechanically sound engines, tested over 50,000 miles or more used one quart or less of oil every 1,000-2,000 miles. Nevertheless, some water-cooled engines in 1974-1977 Audi 100LS vehicles have experienced higher rates of oil consumption in actual customer use.

The FTC claims that "high rates of oil consumption" were abnormally frequent in water-cooled gasoline fueled 1974-1977 Audi 100LS vehicles, at less than 50,000 miles.

Audi denies this claim and states that these vehicles in customer hands have experienced, on a worst case basis, a fleet average oil consumption rate, from whatever causes, of several thousand miles per quart.

When increased oil consumption occurred in individual Audi 100LS vehicles, various different repair operations were performed depending on the precise cause of the problem and the skill and judgment of the mechanic. These repairs included replacement of the cylinder head, of valve stem seals, of piston rings or a "valve job".

The FTC claims that excessive oil consumption was abnormally frequent on these vehicles and that Audi did not inform consumers and dealers of this problem. The FTC also contends that

consumers and dealers were not told that repairs were available to respond to this problem.

Audi denies that oil consumption in Audi 100LS vehicles was in any way abnormal, or that consumers or mechanics required any special information to identify and address any oil usage issues arising with respect to any Audi 100LS vehicle. Audi further states that it has at all times provided specific guidelines for identifying potential problems with the latest and most cost-effective procedures to diagnose and repair them properly.

Proper maintenance and use of a vehicle are important to the durability and reliability of all parts of an automobile engine. The manufacturer spells out in the owner's manual recommended maintenance procedures, and discloses driving habits which should be avoided. However, high rates of oil consumption have been encountered on some 1974-1977 Audi 100LS vehicles even with proper maintenance and use.

Audi's limit for maximum permissible oil consumption in these vehicles is 2.9 qts./1000 miles for the Audi 100LS. The owner's manuals for 1977 model year water-cooled Audi 100LS vehicles stated that "oil consumption can be up to 2.9 qts./1000 miles." This figure, however, is not a statement of expected normal or average oil consumption in these vehicles.

#### Audi's Warranty

Audi provides a limited warranty with each new Audi vehicle sold by one of its dealers. The warranty generally covers any repair and adjustment needed to correct defects in materials and workmanship within the warranty period. However, complaints may occur after the warranty. A manufacturer's warranty is not necessarily the manufacturer's only responsibility, and should not determine the outcome of this case. Likewise, Audi's field guide for maximum permissible oil consumption need not dictate the outcome of this case.

#### Attachment B—Background Statement Engine Damage From Lack of Oil

**Notice:** Please read the attached "Oil Usage" Background Statement, if this case also involves a claim of excessive oil usage or consumption. It may contain useful facts for this case.

#### Background

This case may involve an owner's complaint about engine damage from lack of oil in a gasoline-fueled 1974-1979 [Volkswagen] water-cooled engine [Audi Fox or 5000].

Since 1981, the Federal Trade Commission (FTC) and [Volkswagen (VW)] [Volkswagen of America, Inc., the importer of Audi vehicles (Audi)] have been involved in an administrative lawsuit which includes allegations of excessive oil consumption and engine damage from lack of oil in 1974 to 1979 [VW cars with water-cooled gasoline engines] [Audi Fox and 5000 vehicles]. The FTC has alleged that [VW] [Audi] failed to tell consumers about an "abnormally high" number of engines damaged from lack of oil in these vehicles. [VW] [Audi] has denied this claim and has stated that it has at all times provided owners with more than sufficient information to operate and maintain their vehicles safely and economically. [VW] [Audi] and the FTC have now agreed to settle this dispute without further litigation.

As part of their settlement of this dispute, [VW] [Audi] and the FTC have agreed to allow such complaints to be submitted to mediation and arbitration. They have prepared this statement and the attached statement to give consumers, mediators and arbitrators potentially useful background facts. Some of these facts may not be widely known.

#### Engine Damage From Lack of Oil

Like other automobile engines, the [Volkswagen water-cooled] [Audi] engine will be severely damaged if it is run without sufficient lubricating oil circulating within the engine. Engine components which can be damaged in this manner include connecting rods, crankshaft, bearings and the engine block itself.

Whether a particular automobile engine is damaged from lack of oil depends on three factors: the engine's rate of oil consumption, its effective crankcase capacity, and the intervals at which its oil level is checked and replenished.

Over the life of the engine (100,000 miles or more), the amount of oil consumed by individual 1974-1979 [VW] [Audi] vehicles has varied widely at various times from less than one quart per 7,500 miles (the oil change interval), to more than one quart per 400 miles ([VW's] [Audi's] maximum usage figure (345 miles for the 5000), which was published in 1977-1979 model year vehicle owner's literature).

[Starting with a full crankcase, Rabbit and Scirocco engines can consume approximately three quarts of oil (Dasher—2.5 quarts) without checking and refilling the oil before engine damage becomes an immediate risk. The maximum cruising range of these

vehicles per tankful of gasoline, based on EPA mileage estimates, is approximately 275 miles.]

[Starting with a full crankcase, the Audi vehicles can consume approximately the following amounts of oil without checking and refilling the oil before engine damage becomes an immediate risk:

Fox.....	2.5 quarts
5000.....	4.1 quarts

The approximate maximum distance which these vehicles can be driven per tankful of gasoline, based on EPA mileage estimates, is as follows:

Fox.....	335 miles
5000 (1978).....	290 miles
(1979).....	380 miles

During the period 1974-1979 and thereafter, [Volkswagen] [Audi] received reports that a number of engines in its vehicles had been damaged from insufficient oil.

Between 1974 and 1979, [Volkswagen] [Audi] modified the recommendations in its owner's literature that operators of its vehicles check the oil level at periodic intervals as follows:

- 1974-76 owner's manuals stated "the engine oil level should be checked from time to time";
- 1977-78 owner's manuals stated: "make it a habit to have the engine oil level checked with every second fuel filling";
- 1979 owner's manuals stated: "make it a habit to have the engine oil level checked with every fuel filling";
- 1978-1979 Warranty and Maintenance booklets repeated the above advice on oil checking intervals and included statements as to the consequences of lack of sufficient engine oil.

[Volkswagen only: Volkswagen sent a letter to owners of 1975-1979 Rabbits and Sciroccos (Dasher owners did not receive this letter) to remind them to check the oil level with every fuel filling. The letter was sent to owners of standard transmission cars in approximately August 1979 and to owners of automatic transmission cars in approximately June 1980. Dealers were also told in August 1979 to attach a sticker reading "Check Engine Oil" around the fuel filler neck under the gas cap of each vehicle they serviced.]

The FTC claims that the information contained in the owner's manuals, [and] maintenance booklets [, letter to consumers, and sticker] was insufficient to alert owners to the risk of serious engine damage from lack of oil. The FTC says that oil consumption in 1974-1979 water-cooled gasoline engines could

unexpectedly increase because of deteriorating valve stem seals, and that [VW] [Audi] did not inform owners of this fact. The FTC also says that such an oil consumption increase, if undetected, could lead to severe engine damage from lack of oil, and the FTC claims that [VW] [Audi] did not tell consumers of these facts as well.

[VW] [Audi] says that the information and recommendations in its owner's literature [and communications] were significantly more detailed than those of any other manufacturer and were more than sufficient to prevent any engine damage. [VW] [Audi] denies that oil consumption or valve stem seal performance in its engines was in any way abnormal. [VW] [Audi] says that lubrication-related engine failures were not caused by oil consumption, but by insufficient oil level maintenance, compounded by a large increase in self-service gas stations in the 1970's.

The oil pressure warning light in automobiles is not specifically designed to measure oil level. Therefore, under some operating conditions, the engine may be damaged from low oil level before the oil pressure drops sufficiently to activate the dashboard light.

During the late 1970's, [Volkswagen] [Audi] received reports that some customers who complained of engine damage from lack of oil may have in fact been relying on their dashboard warning lights, rather than their oil dipsticks, to monitor the crankcase oil levels in their cars.

Prior to 1979, all [VW] [Audi] owner's manuals stated that, if the oil pressure warning light comes on while driving, the driver should stop at once, turn the engine off, check the oil level and replenish, if necessary, and not operate the vehicle if the warning light remains on while the engine is restarted. In the 1979 model year, Volkswagen first included additional language, which had not previously appeared in its owner's manuals. This new language stated specifically that the oil pressure warning light is not an oil level indicator and that the dipstick is the proper means of checking the oil level.

#### [Volkswagen's] [Audi's] Warranty

[Volkswagen] [Audi] provides a limited warranty with each new [Volkswagen] [Audi] vehicle sold by one of its dealers. The warranty generally covers any repair and adjustment needed to correct defects in materials and workmanship within the warranty period. However, complaints may occur after the

#### Attachment B100—Background Statement

##### *Engine Damage From Lack of Oil*

**Notice:** Please read the attached "Oil Usage" Background Statement, if this case also involves a claim of excessive oil usage or consumption. It may contain useful facts for this case.

##### Background

This case may involve an owner's complaint about engine damage from lack of oil in a gasoline-fueled 1974-1977 Audi 100LS water-cooled engine.

Since 1981, the Federal Trade Commission (FTC) and Volkswagen of America, the importer of Audi vehicles (Audi) have been involved in an administrative lawsuit which includes allegations of excessive oil consumption and engine damage from lack of oil in 1974 to 1979 Audi cars with water-cooled gasoline engines. The FTC has alleged that Audi failed to tell consumers about an "abnormally high" number of engines damaged from lack of oil in these vehicles. Audi has denied this claim and has stated that it has at all times provided owners with more than sufficient information to operate and maintain their vehicles safely and economically. Audi and the FTC have now agreed to settle this dispute without further litigation.

As part of their settlement of this dispute, Audi and the FTC have agreed to allow such complaints to be submitted to mediation and arbitration. They have prepared this statement and the attached statement to give consumers, mediators and arbitrators potentially useful background facts. Some of these facts may not be widely known.

##### Engine Damage From Lack of Oil

Like other automobile engines, the Audi 100LS engine will be severely damaged if it is run without sufficient lubricating oil circulating within the engine. Engine components which can be damaged in this manner include connecting rods, crankshaft, bearings and the engine block itself.

Whether a particular automobile engine is damaged from lack of oil depends on three factors: the engine's rate of oil consumption, its effective crankcase capacity, and the intervals at which its oil level is checked and replenished.

Over the life of the engine (100,000 miles or more), the amount of oil consumed by individual 1974-1977 Audi 100LS vehicles has varied widely at various times from less than one quart per 7,500 miles (the oil change interval), to more than one quart per 345 miles

(Audi's maximum usage figure, which was published in the 1977 model year vehicle owner's literature).

Starting with a full crankcase, the Audi 100LS engine can consume approximately 3.1 quarts of oil without checking and refilling the oil before engine damage becomes an immediate risk. The maximum cruising range of these vehicles per tankful of gasoline, based on EPA mileage estimates, is approximately 350 miles.

During the period 1974-1977 and thereafter, Audi received reports that a number of engines in its vehicles had been damaged from insufficient oil.

Between 1974 and 1977, Audi modified the recommendations in its owner's literature that operators of its vehicles check the oil level at periodic intervals as follows:

- 1974-76 owner's manuals stated "the engine oil level should be checked from time to time";
- 1977 owner's manuals stated: "make it a habit to have the engine oil level checked with every second fuel filling".

The FTC claims that the information contained in the owner's manuals was insufficient to alert owners to the risk of serious engine damage from lack of oil. The FTC says that oil consumption in 1974-1977 Audi 100 LS water-cooled gasoline engines could unexpectedly increase, and that Audi did not inform owners of this fact. The FTC also says that such an oil consumption increase, if undetected, could lead to severe engine damage from lack of oil, and the FTC claims that Audi did not tell consumers of these facts as well.

Audi says that the information and recommendations in its owner's literature were significantly more detailed than those of any other manufacturer and were more than sufficient to prevent any engine damage. Audi denies that oil consumption performance in its engines was in any way abnormal. Audi says that lubrication-related engine failures were not caused by oil consumption, but by insufficient oil level maintenance, compounded by a large increase in self-service gas stations in the 1970's.

The oil pressure warning light in automobiles is not specifically designed to measure oil level. Therefore, under some operating conditions, the engine may be damaged from low oil level before the oil pressure drops sufficiently to activate the dashboard light.

During the late 1970's, Audi received reports that some customers who complained of engine damage from lack of oil may have in fact been relying on

their dashboard warning lights, rather than their oil dipsticks, to monitor the crankcase oil levels in their cars.

Prior to 1979, all Audi owner's manuals stated that, if the oil pressure warning light comes on while driving, the driver should stop at once, turn the engine off, check the oil level and replenish, if necessary, and not operate the vehicle if the warning light remains on while the engine is restarted.

#### Audi's Warranty

Audi provides a limited warranty with each new Audi vehicle sold by one of its dealers. The warranty generally covers any repair and adjustment needed to correct defects in materials and workmanship within the warranty period. However, complaints may occur after the warranty, including complaints of engine damage from lack of oil. A manufacturer's warranty is not necessarily the manufacturer's only responsibility, and should not determine the outcome of this case.

#### Attachment C—Special Modified Rules for the Arbitration of Volkswagen and Audi Internal Engine Component Claims

##### 1—Definitions

A. "Arbitration" is a process in which two or more persons agree to let an impartial person or panel decide their dispute. This decision may be legally binding when the customer accepts the decision and can be appealed to the courts only under specific and limited circumstances set by state law or by failure of Volkswagen to perform.

B. "You", as used in these rules, means one of the parties involved in the dispute being arbitrated.

C. "BBB" means the Better Business Bureau which is administering the arbitration. "CBBB" is the Council of Better Business Bureaus.

D. "Arbitrator" refers to the individual or panel selected to conduct the arbitration and make a decision in the dispute.

E. "Internal Engine Components" means all gasoline and diesel engine parts, components, and subassemblies included within the complete short block and cylinder head assemblies, including short blocks and cylinder heads, camshafts, valve train components, timing gears, flywheels, pistons, piston rings, crankshafts, connecting rods, and bearings, oil pumps, and associated fasteners, seals and gaskets.

F. "Disputes" that may be arbitrated under these special rules are limited to disagreements between Volkswagen of America, Inc., the manufacturer and a customer involving the claimed failure, malfunction, repair or replacement of

internal engine components in a Volkswagen or Audi vehicle distributed by Volkswagen of America, warranted in writing by Volkswagen of America, or certified by the manufacturer as meeting applicable federal safety and emissions standards. These disputes do not include: (1) Reimbursement for such things as loss of wages, business income, depreciation or loss of value, permanent replacement transportation, or any other consequential damages, unless all the parties agree specifically in writing that the Arbitrator may consider such an item; (2) claims which exceed the cash purchase price of the product involved in the dispute (plus expenses for towing, storage fees, rental car costs, telephone and hotel bills) unless all parties agree specifically in writing that the Arbitrator may consider other costs of purchase; (3) claims involving cars or trucks which are no longer owned or leased by the consumer at the time the claim was referred to the BBB (*if you plan to sell the car before the hearing is held, you must follow the special procedures described in Rule 28*); (4) claims covered by insurance, punitive damages, or claims for mental anguish or personal injury. Expenses for towing, storage fees, rental car costs, telephone and hotel bills may be included in the claim to be arbitrated. The Arbitrator has no authority to decide that a party or parties violated any law or to consider matters which cannot be arbitrated under the law. In making any award for reimbursement, repair or repurchase, the Arbitrator may consider requests for deductions based on such factors as owner usage, mileage, overall condition of the product and optional equipment. The decision as to whether your dispute or any part of your dispute is arbitrable under these rules, or is within the scope of your Agreement to Arbitrate, rests with either BBB and CBBB, subject to the terms of the agreement between Volkswagen and the FTC under which this program is being conducted.

##### 2—Application of These Rules

These special rules apply to any dispute described under the definition of "Disputes" which you agree to arbitrate through the BBB. You must accept these rules when you sign the "\_\_\_\_\_" form.

##### 3—The State Law

The law of the state where your dispute is arbitrated shall apply, unless otherwise noted on your arbitration agreement.

##### 4—Beginning Arbitration

• You may complete the "\_\_\_\_\_" form and indicate you wish to begin arbitration proceedings immediately; or

• You may complete the "\_\_\_" form and indicate you wish to try mediation. The arbitration hearing must be completed within 60 days after receipt of all information necessary for the BBB to investigate your complaint, if no settlement is reached.

The "\_\_\_" form will determine the issues to be arbitrated.

##### 5—Selecting Your Arbitrator

The BBB will maintain a pool of volunteers who reflect, to the extent possible, the total community. Prior to going to arbitration, you will select an Arbitrator from this pool in the following manner:

###### A. The Single Arbitrator

The BBB will provide you and the other parties with an identical list of Arbitrators chosen from the volunteer pool, together with brief biographies of each. The biographies will also note whether the arbitrator has decided other cases with Volkswagen and how they have been decided. After receiving this list you will have five days to cross off any name with whom you have a business or personal relationship, and to assign priorities (#1, #2, #3, etc.) to those remaining. If you do not mail the list in five days, the BBB will assume all names are satisfactory to you. The BBB will select the Arbitrator on the basis of the highest priority common choice of the parties and availability.

###### B. Three-Person Panel

At the option of the BBB or where the state law requires, a panel of three Arbitrators may decide your dispute. To select a panel, you should cross off any name with whom you have a business or personal relationship and assign priorities to those remaining. Your first choice, if available, and the first choice of the other party, if available, will serve with a third Arbitrator whose name has not been crossed off. One person so selected will chair the hearing, and your dispute will be decided by a majority vote of the panel. If your first choice is the same person chosen first by the other parties, that individual will chair the panel and the second or third choices of the parties generally will constitute the other two panel members, subject to availability.

##### 6—Facilities and Costs of Arbitration

The BBB will provide or arrange for facilities to hold your arbitration hearing and it will maintain records of your

arbitration proceeding. If our offices are very far from your home, we will arrange for a hearing facility as close to your home as is reasonably possible. If you want a transcript or tape recording of the proceedings, or if you bring your own lawyer or paid witnesses, you are responsible for these costs.

#### *7—Communicating With the Arbitrator*

Neither you nor Volkswagen may have any direct communication with the Arbitrator about your dispute unless all other parties are present or have given written permission for you to do so. Any communications to the Arbitrator must be sent through the BBB, which will relay them to the other parties to the dispute. Except for your notice of hearing or inspection which will be made by certified mail or by other methods permitted by state law, all BBB communication with you will be by regular mail or by other reasonable means, subject to state law requirements.

#### *8—The Arbitrator's Appointment and Oath*

The BBB will send the Arbitrator a Notice of Appointment, together with a copy of your agreement and these rules. The Arbitrator must sign a special oath and give this to the BBB together with a disclosure of relationships with any parties to the dispute.

#### *9—Disqualifying Arbitrators: Filling Vacancies*

Before signing the oath pledging to make a fair decision in your dispute, the Arbitrator must disclose any financial, competitive, professional, family or social relationship, however remote, with you or any other party to your dispute. If the relationship is such that a fair decision cannot be made, the Arbitrator will refuse to serve. All such disclosures should be given by the Arbitrator to the BBB which will let you know about them and give you an opportunity to accept or reject the Arbitrator, depending on how you believe the relationship might affect the Arbitrator's decision. The BBB, too, may reject an Arbitrator on this basis. If the Arbitrator is rejected, the selection process described in Rule 5 may be repeated, if necessary.

#### *10—Representation by a Lawyer*

In an arbitration hearing you may argue your own case or have someone represent you. If your representative is a lawyer, you must give the lawyer's name and address to the BBB at least eight days before the hearing so the BBB can inform other parties to the dispute and

give them an opportunity to retain a lawyer if they wish.

#### *11—Inspection*

Before the hearing, either you or the Arbitrator may request an inspection of your car. The BBB will have the final decision on whether or not to conduct an inspection. Even if a hearing is to be conducted by telephone or written submissions, the BBB may require an inspection if a fair decision requires one. If any inspection is scheduled, the BBB will send you a Notice of Inspection at least eight (8) days in advance by certified mail (return receipt requested) or by other methods permitted under state law. If you or your representative cannot attend, you will be given an opportunity to comment on any of the observations made at the inspection.

#### *12—Technical Advisers*

At the request of the Arbitrator, the BBB will make every effort to obtain a neutral technical adviser to inspect your car. At the BBB's option, the adviser's findings will be presented in writing or in person either before, during or after the hearing. In any case, you will have an opportunity to evaluate and comment on the qualifications and findings of the adviser.

#### *13—Hearing Date: Notice of Hearing*

When the Arbitrator has agreed to serve, the BBB will set a time and place for your arbitration hearing, with due regard for your convenience and that of the Arbitrator. Notice of your hearing will be sent to you at least eight (3) days in advance by the BBB by certified mail (return receipt requested) or by other methods approved by state law. If you object to the time or place stated in your notice, contact the BBB immediately and let them know. If you do not object or if you come to the hearing, your acceptance of the notice will be assumed.

#### *14—Written or Telephone Hearings*

Although most arbitrations involve oral hearings, the BBB, at your request, may arrange to have your statement and evidence presented by telephone or in writing. If you appear in person, Volkswagen may present its case in person, by telephone, or in writing. If you present your case by telephone, Volkswagen may present its case by telephone or in writing. If you present your case in writing, Volkswagen must also present its case in writing. You always have the right to be present for any oral hearing of your case. Each side has the right to review and respond to any information submitted.

#### *15—Attendance at Hearings*

Unless the customer or Arbitrator objects, observers may attend arbitration hearings to the extent the BBB determines that reasonable accommodations are available. To conduct a proper hearing, the Arbitrator shall enforce appropriate rules of conduct for all observers. Media will be subject to the same limitations imposed by federal courts, unless all parties and the Arbitrator agree to other arrangements.

#### *16—Absence of a Party*

If you are unavailable for a hearing after receiving proper notice, the Arbitrator may decide to hold the hearing in your absence. Your absence does not mean the Arbitrator will automatically decide against you, and you will be given the opportunity to present your statement and any evidence in writing or by telephone within a time period set by the Arbitrator.

#### *17—Record and Transcript of Hearing*

The Arbitrator or the BBB will maintain a written record of the parties, witnesses and evidence presented in a hearing, and all such records will be provided to you upon request for a reasonable cost. If you pay all costs and give reasonable notice, the BBB will arrange to make a transcript of the hearing; however the other parties and the Arbitrator must be given access to or copies of this transcript. At the request of the Arbitrator and at no cost to you, the BBB may record the proceedings and provide a tape to the Arbitrator to assist in making a decision. Observers will not be permitted to make recordings.

#### *18—Interpreters*

If you need an interpreter for your arbitration and can not provide your own, contact the BBB and it will make every effort to find a volunteer interpreter.

#### *19—Oaths*

The Arbitrator will sign a special notarized oath before your hearing. You and your witnesses may be placed under oath at the hearing, except in instances where this procedure is not required by the BBB and state law.

#### *20—Hearing Procedures*

The Arbitrator will decide on the order and procedures for you to present your side of the dispute. You will be given an opportunity to make a personal presentation of your case, as well as present any witnesses and evidence in support of your case. You also may

question the other parties, their witnesses and their evidence. After everyone has given their presentation, you will be given an opportunity to make a closing statement. When the Arbitrator is satisfied that all testimony and evidence have been presented, your hearing will be closed. If you prepare your case or any part of your case in writing for the arbitration, the other party will have an opportunity to see your statement and submit a response to the BBB which will give both to the Arbitrator.

#### 21—Admission of Evidence

You may present your case in person, by telephone, or in writing without being restricted by courtroom rules of evidence. You should be sure your evidence is true and relevant. The Arbitrator may restrict your oral presentation if it is repetitious or not related to the dispute.

#### 22—Incomplete Hearings

If the Arbitrator considers it necessary for a fair decision, new or additional hearings may be scheduled in your dispute. After your hearing has been closed by the Arbitrator, you may request that it be reopened to consider newly discovered evidence that could not have been raised at the original hearing, if the Arbitrator has not yet made a decision. Your request must be sent to the BBB, and copies will be sent to any other parties. The Arbitrator will make the decision on whether to reopen the hearing or not.

#### 23—Subpoena Powers

If you have a reason to believe the other side will not present certain witnesses or evidence which you consider important to a full and fair consideration or dispute, you may send the BBB a request that the Arbitrator subpoena these witnesses or evidence. If the Arbitrator agrees with your request, a subpoena will be sent according to state law.

#### 24—Affidavits

If you have a witness who cannot come to the hearing, you may present that person's written statement (made under oath and notarized, at your option) to the Arbitrator. At your request, and before making a decision, the Arbitrator must give you a reasonable number of days to respond to an affidavit presented by the other party.

#### 25—Time Limits

The BBB shall complete an arbitration hearing within 60 days after receipt of all information necessary for the BBB to

investigate your complaint, regardless of whether you try mediation first. (For automotive complaints, "all information" is the make, model, year, vehicle identification number and description of the problem). These time deadlines may only be extended for delays caused by you.

#### 26—The Decision

##### A. Time

The Arbitrator is required to write a final decision, together with the reasons for the decision, no later than ten days after your hearing is closed. If you have been asked to furnish additional materials related to your dispute, the Arbitrator will set a time for these materials to be sent to the BBB and a final decision will be made within ten days after they are received by the Arbitrator. The BBB will send you a copy of this decision and the reasons for it by certified mail or by other means permitted by State law.

##### B. Scope

The Arbitrator may make any decision, which the Arbitrator deems to be fair and equitable within the scope of your "—" form, provided that laws or regulations do not prohibit all or part of that decision. The decision may order an action to be performed, money to be paid, a combination of remedies or a choice of remedies for you to make. It may give you all, some or none of what you seek. Or it may be a decision in which the Arbitrator feels there should be no payment or performance at all.

##### C. Modifying the Decision

If you believe the final decision is impossible to perform, that it contains a mistake of fact or miscalculation, or that it is otherwise imperfect in form, you should notify the BBB immediately in writing. If your claim is valid, the BBB will share your observation with the other parties and forward it, together with their views, to the Arbitrator who may accept it in whole or in part or reject it altogether.

##### D. Settlement

If you and the other parties voluntarily decide to settle your dispute before the hearing, the settlement will end your dispute and no hearing will be held. You should be sure you are satisfied with the settlement. If Volkswagen agrees to pay you money as part of a voluntary settlement, it must send you a check within 45 days; any repair agreed to under a voluntary settlement must be completed within 30 days. Be sure to let the BBB know about it so the BBB can verify it was done

within the time promised. If your voluntary settlement occurs during the hearing, you may ask the Arbitrator to reflect the settlement in the final decision. If your settlement occurs after the hearing but before the Arbitrator's final decision, be sure to notify the BBB at once.

##### E. Form and Filing

The Arbitrator will make the final decision in writing and it will be notarized before the BBB duplicates it and sends a copy together with reasons for the decision, to you and any other party. The BBB will not make any public disclosure of the decision unless either you and all other parties agree in writing or such disclosure is required by law or is pertinent to judicial or governmental administrative proceedings. The Federal Trade Commission may also receive records of arbitration proceedings.

##### F. Acceptance or Rejection of the Decision

The BBB will send the Arbitrator's decision to you, the consumer, for acceptance or rejection. If you accept the decision:

Volkswagen will be legally bound to abide by the decision; if Volkswagen is ordered to pay you money, it must send you a check within 45 days; any repair that is ordered must be completed within 30 days except that the arbitrator may modify the deadline for repair for good cause shown at the hearing; and

You, too, will be legally bound, which means you give up any right to sue Volkswagen in court on any claim that falls within the scope of your arbitration, unless Volkswagen fails to perform according to the Arbitrator's decision. (If this should happen, first notify the BBB; however, you may legally enforce the decision or pursue other legal remedies under State or federal law should such a failure occur.)

If you reject the decision:

You may pursue other legal remedies under State or Federal law;

Volkswagen will not be obligated to perform any part of the decision; and

Depending on Federal or State law the decision may be introduced as evidence by you or Volkswagen in any civil court action relating to any matter considered in your arbitration hearing.

**Note.**—Your failure to accept or reject the decision within 14 days will be considered a rejection.

##### G. Verification of Performance

If a decision is accepted, Volkswagen must do what the decision requires within the time limits stated. Unless otherwise stated in the decision, the

time for performance begins when the BBB receives your written notice of the acceptance. When this time limit is up, the BBB must contact you within two weeks of when VW was supposed to satisfy the award to be sure Volkswagen has performed.

#### 27—Interpretation of Rules

The BBB will not advise the Arbitrator or make a statement on matters relating to the merits of your case or the reasonableness of the decision. The CBBB will decide procedural questions, the scope of the arbitration agreements, and other question concerning the application and interpretation of these rules, subject to the terms of the agreement between Volkswagen and the Federal Trade Commission under which this program is being conducted.

#### 28—Special Requirements if Vehicle Sold Before Hearing

If you decide to sell your vehicle after you file your claim with the BBB, but before the hearing, the following special provisions apply:

A. You must notify Volkswagen at least ten days in advance of the sale that you intend to sell the vehicle;

B. You must give Volkswagen an opportunity to inspect the vehicle before it is sold;

C. If you sell the vehicle before the problem that prompted the claim is repaired, your recovery will be limited to the estimated repair costs (plus expenses for towing, storage fees, rental car costs, telephone and hotel bills);

D. If you arbitrate a claim for an unrepaired problem on a car that you sold, the party that bought the car is not eligible for arbitration for that problem; Likewise, you may not arbitrate a claim for which a previous owner has already accepted an arbitration award.

#### Attachment D—Special Modified Rules for the Arbitration of Volkswagen and Audi Oil Related Claims

##### 1—Definitions

A. "Arbitration" is a process in which two or more persons agree to let an impartial person or panel decide their dispute. This decision may be legally binding when the customer accepts the decision and can be appealed to the courts only under specific and limited circumstances set by State law or by failure of Volkswagen to perform.

B. "You", as used in these rules, means one of the parties involved in the dispute being arbitrated.

C. "BBB" means the Better Business Bureau which is administering the arbitration. "CBBB" is the Council of Better Business Bureaus.

D. "Arbitrator" refers to the individual or panel selected to conduct the arbitration and make a decision in the dispute.

E. "Disputes" that may be arbitrated under these special rules are limited to disagreements between the manufacturer and a customer relating to complaints involving allegations of excessive oil consumption or engine damage due to lack of oil in a 1974–1979 Volkswagen or Audi vehicle with a water-cooled gasoline engine distributed by Volkswagen of America, warranted in writing by Volkswagen of America, or certified by the manufacturer as meeting applicable federal safety and emissions standards. These disputes do not include: (1) Reimbursement for such things as loss of wages, business income, depreciation or loss of value, permanent replacement transportation, or any other consequential damages, unless all the parties agree specifically in writing that the Arbitrator may consider such an item; (2) claims which exceed the cash purchase price of the product involved in the dispute (plus expenses for towing, storage fees, rental car costs, telephone and hotel bills) unless all parties agree specifically in writing that the Arbitrator may consider other costs of purchase; (3) claims covered by insurance, punitive damages, or claims for mental anguish or personal injury. The vehicle need not be currently owned or leased by the consumer. Expenses for towing, storage fees, rental car costs, telephone and hotel bills may be included in the claim to be arbitrated. The Arbitrator has no authority to decide that a party or parties violated any law or to consider matters which cannot be arbitrated under the law. In making any award for reimbursement, repair or repurchase, the Arbitrator may consider requests for deductions based on such factors as owner usage, mileage, overall condition of the product and optional equipment. The decision as to whether your dispute or any part of your dispute is arbitrable under these rules, or is within the scope of your Agreement to Arbitrate, rests with either BBB and CBBB, subject to the terms of the agreement between Volkswagen and the FTC under which this program is being conducted.

##### 2—Application of These Rules

These special rules apply to any dispute described under the definition of "Disputes" which you agree to arbitrate through the BBB. You must accept these rules when you sign the "Response to Volkswagen Mediation and Arbitration Program" form.

##### 3—The State Law

The law of the state where your dispute is arbitrated shall apply, unless otherwise noted on your arbitration agreement.

##### 4—Beginning Arbitration

- You may complete the "Response to Volkswagen Mediation and Arbitration Program" form and indicate you wish to begin arbitration proceedings immediately; or

- You may complete the "Response to Volkswagen Mediation and Arbitration Program" form and indicate you wish to try mediation. If no settlement is reached, you will be notified of the date of the arbitration hearing at least 30 days in advance of the hearing.

- The answers to the questionnaire included with the "Response to Volkswagen Mediation and Arbitration Program" will determine the issues to be arbitrated.

##### 5—Selecting Your Arbitrator

The BBB will maintain a pool of volunteers who reflect, to the extent possible, the total community. Prior to going to arbitration, you will select an Arbitrator from this pool in the following manner:

###### A. The Single Arbitrator

The BBB will provide you and the other parties with an identical list of Arbitrators chosen from the volunteer pool, together with brief biographies of each. The biographies will also note whether the arbitrator has decided other cases with Volkswagen oil-related claims and how they have been decided. After receiving this list you will have five days to cross off any name with whom you have a business or personal relationship, and to assign priorities (#1, #2, #3, etc.) to those remaining. If you do not mail the list in five days, the BBB will assume all names are satisfactory to you.

The BBB will select the Arbitrator on the basis of the highest priority common choice of the parties and availability.

###### B. Three-Person Panel

At the option of the BBB or where the state law requires, a panel of three Arbitrators may decide your dispute. To select a panel, you should cross off any name with whom you have a business or personal relationship and assign priorities to those remaining. Your first choice, if available, and the first choice of the other party, if available, will serve with a third Arbitrator whose name has not been crossed off. One person so selected will chair the hearing, and your dispute will be decided by a majority

vote of the panel. If your first choice is the same person chosen first by the other parties, that individual will chair the panel and the second or third choices of the parties generally will constitute the other two panel members, subject to availability.

#### 6—Facilities and Costs of Arbitration

The BBB will provide or arrange for facilities to hold your arbitration hearing and it will maintain records of your arbitration proceeding. If our offices are very far from your home, we will arrange for a hearing facility as close to your home as is reasonably possible. If you want a transcript or tape recording of the proceedings, or if you bring your own lawyer or paid witnesses, you are responsible for these costs.

#### 7—Communicating With the Arbitrator

Neither you nor Volkswagen may have any direct communication with the Arbitrator about your dispute unless all other parties are present or have given written permission for you to do so. Any communications to the Arbitrator must be sent through the BBB, which will relay them to the other parties to the dispute. Except for your notice of hearing or inspection which will be made by certified mail or by other methods permitted by state law, all BBB communication with you will be by regular mail or by other reasonable means, subject to state law requirements.

#### 8—The Arbitrator's Appointment and Oath

The BBB will send the Arbitrator a Notice of Appointment, together with a copy of your agreement and these rules. The Arbitrator must sign a special oath and give this to the BBB together with a disclosure of relationships with any parties to the dispute.

#### 9—Disqualifying Arbitrators; Filling Vacancies

Before signing the oath pledging to make a fair decision in your dispute, the Arbitrator must disclose any financial, competitive, professional, family or social relationship, however remote, with you or any other party to your dispute. If the relationship is such that a fair decision cannot be made, the Arbitrator will refuse to serve. All such disclosures should be given by the Arbitrator to the BBB which will let you know about them and give you an opportunity to accept or reject the Arbitrator, depending on how you believe the relationship might affect the Arbitrator's decision. The BBB, too, may reject an Arbitrator on this basis. If the Arbitrator is rejected, the selection

process described in Rule 5 may be repeated, if necessary.

#### 10—Representation by a Lawyer

In an arbitration hearing you may argue your own case or have someone represent you. If your representative is a lawyer, you must give the lawyer's name and address to the BBB at least eight days before the hearing so the BBB can inform other parties to the dispute and give them an opportunity to retain a lawyer if they wish.

#### 11—Inspection

Before the hearing, either you or the Arbitrator may request an inspection of your car. The BBB will have the final decision on whether or not to conduct an inspection. Even if a hearing is to be conducted by telephone or written submissions, the BBB may require an inspection if a fair decision requires one. If any inspection is scheduled, the BBB will send you a Notice of Inspection at least eight (8) days in advance by certified mail (return receipt requested) or by other methods permitted under state law. If you or your representative cannot attend, you will be given an opportunity to comment on any of the observations made at the inspection.

#### 12—Technical Advisers

At the request of the Arbitrator, the BBB will make every effort to obtain a neutral technical adviser to inspect your car. At the BBB's option, the adviser's findings will be presented in writing or in person either before, during or after the hearing. In any case, you will have an opportunity to evaluate and comment on the qualifications and findings of the adviser.

#### 13—Hearing Date: Notice of Hearing

When the Arbitrator has agreed to serve, the BBB will set a time and place for your arbitration hearing, with due regard for your convenience and that of the Arbitrator. Notice of your hearing will be sent to you at least eight (8) days in advance by the BBB by certified mail (return receipt requested) or by other methods approved by state law. If you object to the time or place stated in your notice, contact the BBB immediately and let them know. If you do not object or if you come to the hearing, your acceptance of the notice will be assumed.

#### 14—Written or Telephone Hearings

Although most arbitrations involve oral hearings, the BBB, at your request, may arrange to have your statement and evidence presented by telephone or in writing. If you appear in person, Volkswagen may present its case in

person, by telephone, or in writing. If you present your case by telephone, Volkswagen may present its case by telephone or in writing. If you present your case in writing, Volkswagen must also present its case in writing. You always have the right to be present for any oral hearing of your case. You also have the right to review and respond to any information submitted by Volkswagen.

#### 15—Attendance at Hearings

Unless the customer or Arbitrator objects, observers may attend arbitration hearings to the extent the BBB determines that reasonable accommodations are available. To conduct a proper hearing, the Arbitrator shall enforce appropriate rules of conduct for all observers. Media will be subject to the same limitations imposed by federal courts, unless all parties and the Arbitrator agree to other arrangements.

#### 16—Absence of a Party

If you are unavailable for a hearing after receiving proper notice, the Arbitrator may decide to hold the hearing in your absence. Your absence does not mean the Arbitrator will automatically decide against you, and you will be given the opportunity to present your statement and any evidence in writing or by telephone within a time period set by the Arbitrator.

#### 17—Record and Transcript of Hearing

The Arbitrator or the BBB will maintain a written record of the parties, witnesses and evidence presented in a hearing, and all such records will be provided to you upon request for a reasonable cost. If you pay all costs and give reasonable notice, the BBB will arrange to make a transcript of the hearing; however the other parties and the Arbitrator must be given access to or copies of this transcript. At the request of the Arbitrator and at no cost to you, the BBB may record the proceedings and provide a tape to the Arbitrator to assist in making a decision. Observers will not be permitted to make recordings.

#### 18—Interpreters

If you need an interpreter for your arbitration and can not provide your own, contact the BBB and it will make every effort to find a volunteer interpreter.

#### 19—Oaths

The Arbitrator will sign a special notarized oath before your hearing. You and your witnesses may be placed

under oath at the hearing, except in instances where this procedure is not required by the BBB and state law.

#### 20—Hearing Procedures

The Arbitrator will decide on the order and procedures for you to present your side of the dispute. You will be given an opportunity to make a personal presentation of your case, as well as present any witnesses and evidence in support of your case. You also may question the other parties, their witnesses and their evidence. After everyone has given their presentation, you will be given an opportunity to make a closing statement. When the Arbitrator is satisfied that all testimony and evidence have been presented, your hearing will be closed. If you prepare your case or any part of your case in writing for the arbitration, the other party will have an opportunity to see your statement and submit a response to the BBB which will give both to the Arbitrator.

#### 21—Admission of Evidence

You may present your case in person, by telephone, or in writing without being restricted by courtroom rules of evidence. You should be sure your evidence is true and relevant. The Arbitrator may restrict your oral presentation if it is repetitious or not related to the dispute.

#### 22—Incomplete Hearings

If the Arbitrator considers it necessary for a fair decision, new or additional hearings may be scheduled in your dispute. After your hearing has been closed by the Arbitrator, you may request that it be reopened to consider newly discovered evidence that could not have been raised at the original hearing, if the Arbitrator has not yet made a decision. Your request must be sent to the BBB, and copies will be sent to any other parties. The Arbitrator will make the decision on whether to reopen the hearing or not.

#### 23—Subpoena Powers

If you have a reason to believe the other side will not present certain witnesses or evidence which you consider important to a full and fair consideration or dispute, you may send the BBB a request that the Arbitrator subpoena these witnesses or evidence. If the Arbitrator agrees with your request, a subpoena will be sent according to state law.

#### 24—Affidavits

If you have a witness who cannot come to the hearing, you may present that person's written statement (made

under oath and notarized, at your option) to the Arbitrator. At your request, and before making a decision, the Arbitrator must give you a reasonable number of days to respond to an affidavit presented by the other party.

#### 26—Time Limits

If you contact the BBB or Volkswagen about an oil consumption or engine damage from lack of oil complaint on an eligible 1974–1979 VW or Audi, you will be sent an information packet within fifteen days or before 60 days after the program goes into effect, whichever is later.

After you return the form indicating you wish to participate in the program, an arbitration hearing must be completed within 60 days after Volkswagen receives your form, regardless of whether you try mediation first. This time deadline may only be extended for delays caused by you.

#### 27—The Decision

##### A. Time

The Arbitrator will write a final decision, together with the reasons for the decision, no later than ten days after your hearing is closed. If you have been asked to furnish additional materials related to your dispute, the Arbitrator will set a time for these materials to be sent to the BBB and a final decision will be made within ten days after they are received by the Arbitrator. The BBB will send you a copy of this decision and the reasons for it by certified mail or by other means permitted by state law.

##### B. Scope

The Arbitrator may make any decision, which the Arbitrator deems to be fair and equitable within the scope of your "Response to Volkswagen Mediation and Arbitration" form, provided that laws or regulations do not prohibit all or part of that decision. The decision may order an action to be performed, money to be paid, a combination of remedies or a choice of remedies for you to make. It may give you all, some or none of what you seek. Or it may be a decision in which the Arbitrator feels there should be no payment or performance at all.

##### C. Modifying the Decision

If you believe the final decision is impossible to perform, that it contains a mistake of fact or miscalculation, or that it is otherwise imperfect in form, you should notify the BBB immediately in writing. If your claim is valid, the BBB will share your observation with the other parties and forward it, together

with their views, to the Arbitrator who may accept it in whole or in part or reject it altogether.

#### D. Settlement

If you and the other parties voluntarily decide to settle your dispute before the hearing, the settlement will end your dispute and no hearing will be held. You should be sure you are satisfied with the settlement. If Volkswagen agrees to pay you money as part of a voluntary settlement, it must send you a check within 45 days; any repair agreed to under a voluntary settlement must be completed within 30 days. Be sure to let the BBB know about it so the BBB can verify it was done within the time promised. If your voluntary settlement occurs during the hearing, you may ask the Arbitrator to reflect the settlement in the final decision. If your settlement occurs after the hearing but before the Arbitrator's final decision, be sure to notify the BBB at once.

#### E. Form and Filing

The Arbitrator will make the final decision in writing and it will be notarized before the BBB duplicates it and sends a copy together with reasons for the decision, to you and any other party. The BBB will not make any public disclosure of the decision unless either you and all other parties agree in writing or such disclosure is required by law or is pertinent to judicial or governmental administrative proceedings. The Federal Trade Commission may also receive records of arbitration proceedings.

#### F. Acceptance or Rejection of the Decision

The BBB will send the Arbitrator's decision to you, the consumer, for acceptance or rejection. If you accept the decision:

Volkswagen will be legally bound to abide by the decision; if Volkswagen is ordered to pay you money, it must send you a check within 45 days; any repair that is ordered must be completed within 30 days, except that the arbitrator may modify the deadline for repair for good cause shown at the hearing; and

You, too, will be legally bound, which means you give up any right to sue Volkswagen in court on any claim that falls within the scope of your arbitration hearing, unless Volkswagen fails to perform according to the Arbitrator's decision. (If this should happen, first notify the BBB; however, you may legally enforce the decision or pursue other legal remedies under state or federal law should such a failure occur.)

If you reject the decision:

You may pursue other legal remedies under state or Federal law;

Volkswagen will not be obligated to perform any part of the decision; and

Depending on Federal or State law the decision may be introduced as evidence by you or Volkswagen in any civil court action relating to any matter considered in your arbitration hearing.

**Note.**—Your failure to accept or reject the decision within 14 days will be considered a rejection.

#### G. Verification of Performance

If a decision is accepted, Volkswagen must do what the decision requires within the time limits stated. Unless otherwise stated in the decision, the time for performance begins when the BBB received written notice of the acceptance. When this time limit is up, the BBB must contact the consumer within two weeks of when VW was supposed to perform to be sure Volkswagen has performed.

#### 28—Interpretation of Rules

The BBB will not advise the Arbitrator or make a statement on matters relating to the merits of your case or the reasonableness of the decision. The CBBB will make the decision on procedural questions, the scope of the agreements, and other questions concerning the application and interpretation of these rules, subject to the terms of the agreement between Volkswagen and the Federal Trade Commission under which this program is being conducted.

#### Attachment E1—[Settlement Offer]

Dear [VW] [Audi] owner:

You have expressed concern about unsatisfactory oil consumption or engine damage from lack of oil on your gasoline-fueled [brand, model, model year, with VIN, if known].

We are writing to tell you about a Free claim settlement program which we are offering to you and other owners who may have experienced these conditions. The program may result in a Refund, Free Repair, or both. We are offering you this program under a settlement of a lawsuit with the Federal Trade Commission (FTC).

You do not still have to own or lease the car to be eligible. But, you must fill out the enclosed form to take advantage of this free program.

Under this program, we can resolve your problem in one of three ways:

1. If you agree, we will settle with you immediately, on the following basis:

[Statement of Offer]

2. If our settlement offer is not acceptable to you, you can use the mediation services of your local BBB office, before proceeding to arbitration.

3. Or, you may want to use the arbitration services of your local BBB, without trying mediation.

If you want to resolve your complaint now, check the first box on the enclosed form. We will settle your claim for the amount stated on the enclosed form. If you accept, you will receive a check within 45 days.

If you want to use the BBB's mediation services before going to arbitration, check the second box on the enclosed form and fill out the brief questionnaire on the back of the form. If mediation efforts are not successful, the BBB will arrange a date for arbitration within 60 days from when we receive this form. If the case is settled, or the arbitrator makes an award in your favor, you will then receive a check within 45 days, or your car will be repaired in most cases, within 30 days.

If you want to use the BBB's arbitration services without trying mediation, check the third box on the enclosed form and fill out the brief questionnaire on the back of the form. The BBB will set an arbitration hearing to be held within 60 days. If the arbitrator makes a decision in your favor, you will receive a check within 45 days, or your car will be repaired in most cases, within 30 days.

If you want to use mediation or arbitration, please include copies of as much documentation as you can with your claim form. This will expedite processing and may help us negotiate a settlement with you directly.

Under the mediation program, a BBB employee will try to help Volkswagen and you to agree on a settlement. With arbitration, a volunteer from the community will conduct an informal hearing where you and VW will present the facts. The volunteer arbitrator will then decide what relief to award you, if any. The arbitrator's decision is legally binding only if you decide to accept it. [A "legally binding" decision means that we must do what the arbitrator says and that you will be unable to pursue your claim in further legal proceedings]. If you reject the decision then you have the option of pursuing further legal proceedings that might be available to you under applicable laws. However, once you have rejected an arbitrator's decision, you will not be able to arbitrate your claim again or to reinstate the arbitrator's award.

We have enclosed a brochure which describes the BBB program and other special provisions in detail.

We also have enclosed "Background Statements," prepared jointly by the FTC and Volkswagen, to give you some useful facts about oil usage and engine damage from lack of oil. You should read these documents carefully before deciding whether to accept our settlement offer described in this letter or preparing your claim for the mediation and arbitration programs. If you take your case to the BBB, you may give the Background Statements to the mediator or arbitrator, or otherwise use them in preparing your arguments.

You are free to accept our offer, to reject it and take your complaint immediately to the Better Business Bureau program for mediation and then arbitration. Or, you can reject our offer and begin the arbitration process immediately, omitting further mediation efforts. Just fill out the enclosed form "Response to Volkswagen Mediation and Arbitration Program" and send it to us in the enclosed postage pre-paid envelope.

We look forward to hearing from you soon.

Sincerely,

Volkswagen of America.

#### [Settlement Offer Made]

#### Response to Volkswagen Mediation and Arbitration Programs

☐ 1. I accept Volkswagen of America's settlement offer in the amount of \$\_\_\_\_.00. Volkswagen of America will send me a check for this amount within 45 days of receipt of this response. I understand that by accepting this settlement I release Volkswagen [insert language specifying release that comports with Paragraph E of Section IV].

☐ 2. I want to use the BBB mediation and arbitration procedures. I understand that if mediation efforts are not successful, my local BBB will set an arbitration hearing date for less than 60 days after you receive this form. I have also read the enclosed brochure describing the BBB mediation and arbitration program, and the enclosed Background Statement(s).

☐ 3. I want to proceed to an arbitration hearing without using BBB's mediation services first. I understand that my local BBB will set an arbitration date for less than 60 days after you receive this form. I have also read the enclosed brochure describing the BBB mediation and arbitration program, and the enclosed Background Statement(s).

If you checked 2. or 3., please fill out the brief questionnaire on the back of this form. Be sure to fill out the form carefully. The arbitrator will not be able to decide any issues not set out in the form, and will be able to give you only what you asked for on the form.

Signature: \_\_\_\_\_

Please print your name, address and telephone number where you can be reached during the day:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_

State: \_\_\_\_\_

ZIP: \_\_\_\_\_

Daytime Phone ( ) \_\_\_\_\_

Evening Phone ( ) \_\_\_\_\_

Be sure to fill out the form carefully, because it will determine what issues the arbitrator can decide.

Please Describe Briefly the Problem You Had With Your Car: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**What Has This Problem Cost You?**  
(You may include related expenses for rental cars, towing, storage fees, and telephone calls, as well as repairs and other direct costs, but do not include any costs from loss of business, wages, or personal injury.)

\$ \_\_\_\_\_

**Note.**—The arbitrator will not be allowed to award you more than the amount stated here.

**Does the Car Still Need Repairs for Excessive Oil Consumption or for Engine Damage From Lack of Oil?**

Yes \_\_\_\_\_

No \_\_\_\_\_

If you know, what repairs does it need?

What is the approximate current mileage, if you still own the car?

Vehicle Identification No. (if known):

Model:

Model Year \_\_\_\_\_

Please send in copies of any records, if you have them, of the amount of your claim (bills, checks, receipts, etc.). This will expedite processing and possible settlement of your claim.

#### Attachment E2—[No Settlement Offer]

Dear [VW] [Audi] owner:

You have expressed concern about unsatisfactory oil consumption or engine damage from lack of oil on your gasoline-fueled [brand, model, model year, with VIN, if known].

We are writing to tell you about a FREE claim settlement program which we are offering to you and other owners who may have experienced these conditions. The program may result in a REFUND, FREE REPAIR, or both. We are offering you this program under a settlement of a lawsuit with the Federal Trade Commission (FTC).

You do not still have to own or lease the car to be eligible. But, you must fill out the enclosed form to take advantage of this free program.

Under this program, we can resolve your problem in one of two ways:

1. You can use the mediation services of your local Better Business Bureau (BBB) office, followed by arbitration, if necessary.
2. Or, you may want to use the arbitration services of your local BBB, without trying mediation.

If you want to use the BBB's mediation service before going to arbitration, check the first box on the front of the enclosed form, fill out the brief questionnaire on the back and mail it in. If mediation does not resolve the

matter, the BBB will arrange a date for arbitration within 60 days from when we receive this form. If the case is settled, or the arbitrator makes an award in your favor which you accept, you will then receive a check within 45 days, or your car will be repaired in most cases within 30 days.

If you want to use the BBB's arbitration services without trying mediation first, check the second box on the enclosed form, and fill out the brief questionnaire on the back and mail it in. The BBB will set an arbitration hearing to be held within 60 days from when we receive this form. If the arbitrator makes a decision in your favor which you accept, you will receive a check within 45 days, or your car will be repaired in most cases within 30 days after your acceptance is received.

If you want to use mediation or arbitration, please include copies of as much documentation as you can with your claim form. This will expedite processing and may help us to negotiate a settlement with you directly.

Under the mediation program, a BBB employee will try to help Volkswagen and you to agree on a settlement. With arbitration, a volunteer from the community will conduct an informal hearing where you and VW will present the facts. The volunteer arbitrator will then decide what relief to award you, if any. The arbitrator's decision is legally binding only if you decide to accept it. [A "legally binding" decision means that we must do what the arbitrator says and that you will be unable to pursue your claim in further legal proceedings.] If you reject the decision then you have the option of pursuing further legal proceedings that might be available to you under applicable laws. However, once you have rejected an arbitrator's decision, you will not be able to arbitrate your claim again or to reinstate the arbitrator's award.

We have enclosed a brochure which describes the BBB program and other special provisions in detail.

We also have enclosed "Background Statements," prepared jointly by the FTC and Volkswagen, to give you some useful facts about oil usage and engine damage from lack of oil. You should read these documents carefully before preparing your claim for the mediation and arbitration programs. If you take your case to the BBB, you may give the Background Statements to the mediator or arbitrator, or otherwise use them in preparing your arguments.

You are free to take your complaint immediately to the Better Business Bureau program for mediation and then arbitration. Or, you can begin the arbitration process immediately, omitting further mediation efforts. Just fill out the enclosed form "Response to Volkswagen Mediation and Arbitration Program" and send it to us in the enclosed postage pre-paid envelope.

We look forward to hearing from you soon.

Sincerely,

Volkswagen of America.

#### [No Settlement Offer Made]

**Response to Volkswagen Mediation and Arbitration Program**

☐ 1. I want to use the BBB mediation and arbitration procedures. I understand

that if mediation efforts are not successful, my local BBB will set an arbitration hearing date for less than 60 days after you receive this form. I have also read the enclosed brochure describing the BBB mediation and arbitration program, and the enclosed Background Statement(s).

☐ 2. I want to proceed to an arbitration hearing without using BBB's mediation services first. I understand that my local BBB will set an arbitration date for less than 60 days after you receive this form. I have also read the enclosed brochure describing the BBB mediation and arbitration program, and the enclosed Background Statement(s).

If you checked 1. or 2., please fill out the brief questionnaire on the back of this form. Be sure to fill out the form carefully. The arbitrator will not be able to decide any issues not set out in the form, and will be able to give you only what you asked for on the form.

Signature: \_\_\_\_\_

Please print your name, address and telephone number where you can be reached during the day:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_

State: \_\_\_\_\_

Zip: \_\_\_\_\_

Daytime

Phone ( ) \_\_\_\_\_

Evening

Phone ( ) \_\_\_\_\_

Be sure to fill out the form carefully, because it will determine what issues the arbitrator can decide.

Please Describe Briefly the Problem You Had With Your Car: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**What Has This Problem Cost You?**  
(You may include related expenses for rental cars, towing, storage fees, and telephone calls, as well as repairs and other direct costs, but do not include any costs from loss of business, wages, or personal injury.)

\$ \_\_\_\_\_

**Note.**—The arbitrator will not be allowed to award you more than the amount stated here.

**Does the Car Still Need Repairs for Excessive Oil Consumption or for Engine Damage From Lack of Oil?**

Yes \_\_\_\_\_

No \_\_\_\_\_  
If you know, what repairs does it need?

What is the approximate current mileage, if you still own the car?

Vehicle Identification No. (if known):

Model:

Model Year \_\_\_\_\_

Please send in copies of any records, if you have them, of the amount of your claim (bills, checks, receipts, etc.). This will expedite processing and possible settlement of your claim.

**Attachment F—Brochure for Claimants Describing the Auto Line Program for Oil-Related Claims on 1974-1979 Volkswagen and Audi Vehicles**

*What is Auto Line?*

*Auto Line* is an out-of-court program run by Better Business Bureaus to settle disputes between consumers and certain automobile manufacturers who agree to arbitrate complaints about their products and repairs. It includes a mediation service to settle claims voluntarily.

*Auto Line* is being used to implement a settlement of a 1981 lawsuit between Volkswagen of America and The Federal Trade Commission (FTC). Because some special provisions apply, this brochure only describes the *AUTO LINE* program for problems involving excessive oil consumption and engine damage from lack of oil in 1974 to 1979 Volkswagen and Audi vehicles equipped with water-cooled, gasoline-powered engines distributed by Volkswagen of America, warranted in writing by Volkswagen of America, or certified by the manufacturer as meeting applicable Federal safety and emissions standards. These vehicles were the subject of that lawsuit.

The FTC/Volkswagen/Audi settlement provides that any consumer who has a claim involving one of the oil-related problems noted above may use *Auto Line* to resolve it. This mediation and arbitration process is free of charge to the consumer. If efforts at mediation fail, or if the consumer elects to bypass the mediation phase, the BBB-appointed arbitrator will conduct a fact-finding hearing and make a decision in the matter. If the consumer accepts the decision, Volkswagen must do as the arbitrator directs.

This booklet describes the *BBB Auto Line* program and tells you how to participate in the arbitration process.

To participate in this *Auto Line* program, consumers are not required to presently own or lease their car. Volkswagen and the FTC have agreed that previous owners or consumers who leased these cars may seek to resolve oil problem claims through the *Auto Line* programs.

In addition, Volkswagen has agreed with the FTC to use *Auto Line* to resolve any complaint that involves an engine component on one of its previous, current, or future model year vehicles. Also, VW has voluntary programs that provide for arbitrating certain complaints for other parts of the car. However, if the dispute does not concern an oil-related problem with the 1974 to 1979 vehicles noted on page 1, you must write to Volkswagen or call your local Better Business Bureau to receive a different brochure about these programs.

The *Auto Line* Program offers:

- A mediated resolution of the dispute by BBB staff;
  - Arbitration of claims if mediation has been unsuccessful or if the consumer elects to bypass mediation;
  - A broad-based pool of trained volunteers from the local community who, as neutral arbitrators, decide the case;
  - Arbitrators who are chosen by both the consumer and VW;
  - Procedures that are informal and allow consumers to present their own cases.
- Under the *Auto Line* Program:
- Mediation is voluntary;
  - The arbitration hearing must be completed within 50 days after the consumer enters the program;
  - Consumers can present their case in person, by telephone, or in writing;
  - Hearings are private unless the consumer agrees to have public observers;
  - An on-site vehicle inspection by an independent technical adviser to the arbitrator is available, if necessary;
  - Consumers can pursue other available remedies if they do not accept the arbitrator's decision;
  - Mediation and arbitration will be monitored by the Federal Trade Commission.

**How Long Does Auto Line Take?**

Volkswagen and the FTC have agreed that specific deadlines shall govern the mediation and arbitration process.

• Whether or not you elect to mediate your claim, mediation and the arbitration hearing, if necessary, shall be completed within 60 days from the

day Volkswagen receives your request for arbitration and your completed forms. You will be notified in writing at least 8 days in advance of the date scheduled for the arbitration hearing.

• If the arbitrator orders Volkswagen to give you a money settlement, it must be paid within 45 days of the date you accept the decision.

• If the arbitrator orders Volkswagen to repair your car, the repair must be performed within 30 days of the date you accept the arbitrator's decision, unless the arbitrator shortens or lengthens the deadline for good cause shown. These 45- and 30-day deadlines also apply to any settlement you may reach with Volkswagen during the mediation process.

If any of these deadlines are missed, Volkswagen may have violated the agreement between it and the FTC. If this happens, you may inform the FTC (Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Avenue, NW., Washington, DC 20580). However, if a delay is caused by you (for example, if you request an extension of time in which to prepare for your hearing or if you ask that the hearing be rescheduled for a later, more convenient date), that time is not counted.

*Beginning the Auto Line Program*

When you receive the form entitled "Response to Volkswagen Mediation and Arbitration Program" from Volkswagen, decide whether you wish to enter the *Auto Line* program. If you have not received "Response to Volkswagen Mediation and Arbitration Program" from Volkswagen, contact the company. Volkswagen's toll-free number is (800-) 822-8987, or you can write to Volkswagen of America at 888 West Big Beaver Road, Troy, Michigan 48007. Tell Volkswagen your name, address, telephone number, the make and model year of your car, and whether your claim involves oil consumption, engine damage due to lack of oil or both.

When Volkswagen sends you the *Auto Line* program form, it may offer to settle your claim without requiring either mediation or arbitration. You must decide whether to take Volkswagen's initial settlement offer, or to proceed with participation in the arbitration program.

If you decide to enter the *Auto Line* program, complete the form from Volkswagen with as much information as possible and promptly return it to Volkswagen. Try to include the make, model, year and, the Vehicle Identification Number (VIN) of the car, together with a statement describing

your problem. These are the most critical pieces of information, but other parts of the form are also important, including what you want VW to do. This must be stated because the arbitrator's decision-making authority is limited to what you write on the form. (For example, if you request a refund of \$100, the arbitrator cannot award you more than the amount you have requested.) Remember, also, to enclose *copies* of any documents you have that may help prove your case. If you no longer have copies of repair bills or cancelled checks, you might contact the repair shop or your bank or credit card company for copies.

#### *The Mediation Stage*

If you choose to participate in mediation, the BBB will review your claim and then review the position of Volkswagen. The BBB will try to achieve an informal resolution by serving as an intermediary between you and Volkswagen. If you negotiate a settlement with Volkswagen yourself, let the BBB know, so such a settlement can be verified.

Should the BBB mediation efforts fail, an arbitration hearing will be scheduled automatically within 30 days of Volkswagen's receipt of your request for mediation and arbitration.

If at any time, you decide that you do not want the BBB to continue seeking a mediated settlement of your complaint, or if you prefer not to try mediation, notify the BBB in writing. In either case, the agreement between the FTC and Volkswagen requires that the arbitration hearing be scheduled and held within 60 days of Volkswagen's receipt of your request for mediation or arbitration.

#### *The Arbitration Process*

It is important for you to know what issues Volkswagen will arbitrate and those which it need not arbitrate. Volkswagen must arbitrate your claims for the cost of completed repairs, of needed repairs and for expenses related to your complaint of oil consumption or engine damage from lack of oil. Such expenses also include the cost of towing, rental cars, telephone calls, storage fees for your car, and hotel bills, and any amount by which you claim that the resale price of your car was reduced because of oil consumption or engine damage which had not been repaired when the car was sold. The maximum amount you may claim is what you paid for the car plus related expenses.

Issues that may not be arbitrated in the BBB program include punitive damages, loss of business income, insurance claims, personal injury and

property damage claims, and allegations of fraud or other violations of criminal law. Such issues are best dealt with in a court of law, and you are free to pursue such claims outside the context of arbitration.

#### *Who Are The Arbitrators?*

Thousands of volunteers from all walks of life serve the BBB as arbitrators—decision makers—in these cases. They include professionals, educators, retirees, lawyers, housewives, and others, who have gone through a special training program. Arbitrators are not employed by the BBB, nor are they paid for their services. They perform this duty as a public service. All arbitrators are required to disclose, as a condition of hearing a case, any financial, commercial, professional, social or familial relationship—no matter how remote—with any of the parties or their counsel. No more than one-third of the arbitrators on the selection list sent to you by the BBB may be persons at a supervisory level in a company that makes, services, or sells a product. In all cases, your dispute will be decided by someone who is completely independent and has no vested interest in the outcome.

#### *Choosing An Arbitrator*

Although state law and BBB policies offer various means of choosing arbitrators, normally you will be given a list of trained community volunteers together with a brief biography of each. You will be asked to cross off any arbitrator with whom you may have a business, financial, or social relationship, to select the arbitrator who is your first choice, and to indicate your priority preference ("2," "3," etc.) from the remaining names. The highest overlapping priority choices of both parties usually becomes the arbitrator. Where state law requires it, a panel of three arbitrators may decide your case. In this situation, your first choice and Volkswagen's first choice for an arbitrator will be appointed to the panel, along with a third arbitrator who was not crossed off by either party.

After you have returned your arbitrator choices to the BBB, along with an indication of the times when you will not be available to attend a hearing, the BBB will tell you when and where the hearing is to be held. If you have chosen to present your case in writing or by telephone, you also must make that choice known to the BBB.

#### *What Does Arbitration Cost?*

The agreement between Volkswagen and the FTC requires Volkswagen to

pay the costs of *Auto Line*. You will have no costs unless you choose to bring your own paid witnesses or retain an attorney. Copies of records and documents that are a part of the hearing will be available to you at any time for a reasonable cost. Also, if you want a recording of the entire proceedings, you must pay recording expenses.

#### *The Hearing*

The actual hearing is an informal session. It is designed to ensure that you and Volkswagen's representative get a full opportunity to describe the dispute to the arbitrator.

Normally, arbitration hearings are held at the BBB during regular working hours; however, the BBB will schedule a time and place convenient to you and to the others involved.

The hearings usually feature in-person presentations, during which each side presents its case to an arbitrator and all have an opportunity to ask questions, including the arbitrator. Most consumers choose to have in-person hearings, and the BBB believes this is the best way of getting all the facts before the arbitrator. However, you also have the option of presenting your case by telephone or in writing.

A Volkswagen representative usually will attend the hearing to present its case. However, Volkswagen, at its option, also may present its case by telephone or mail (if you appear in person), or by mail (if you present your case by telephone). You always may present your case in person, even if Volkswagen does not.

You may be represented by an attorney or other spokesperson, bring witnesses and present documents, bills, and any other information to prove your case. If you are being represented by a lawyer, tell the BBB as soon as possible so that Volkswagen can be given an opportunity to get legal counsel.

At no time may you or your representative, or Volkswagen or its representative contact the arbitrator without the other party being present. All communications relating to the arbitration must be directed through the BBB. It will forward all information and make sure the other side gets copies when necessary.

#### *When Are Inspections And Technical Advisers Involved?*

Sometimes the arbitrator will want to see the car or the repair work to get a full understanding of the facts. The BBB will send you a notice of the inspection time and place. You should be present for such an inspection, and you have a right to bring your own expert if you

wish. Should the arbitrator request a technical adviser, the BBB will identify experts in the community who have no relationship with any party and are not potential competitors of Volkswagen.

If you no longer own or lease the car for which the claim is made, you will not be penalized in any way because the car is unavailable for inspection.

#### *How To Prepare for Arbitration?*

Before coming to the hearing, you should prepare an outline of your argument to help you in your presentation. In that way, you won't forget important points in your favor. To assist you in your preparation, a checklist is given at the end of this section.

Also, before coming to the hearing, you should prepare a list of questions you want to ask Volkswagen. A careful reading of the Background Statements provided to you by VW and the FTC with the letter informing you of the program's availability should assist you in your preparation. During the hearing, you can add to your list of questions. Include anything new that occurs to you when you hear what the other side has to say.

After you state the facts as you see them, Volkswagen has a right to ask you questions. After Volkswagen has stated the facts as they see them, you have the same right to ask them questions. To clarify uncertain areas and to gain a fuller understanding of the dispute, the arbitrator also is trained to ask questions.

After each side has presented its case and the questioning is completed, you should be prepared to give a summary of your position. Try to describe the weak points in Volkswagen's case, deal with any questions that have not otherwise been answered, and tell the arbitrator exactly what kind of decision you want and why.

Remember that the sole purpose of the hearing is to allow the arbitrator to gather and sort the facts and thus make a fair decision. You should be prepared to convince the arbitrator that your position is right and that your opponent's is wrong.

A friendly, sincere approach works best. You are there because you and Volkswagen have a disagreement, but keep that disagreement factual and within the bounds of normal courtesy and conventional language. Bombarding an arbitrator with technical jargon will not be productive, nor will rudeness, arguing with the arbitrator, or belittling your opponent. Put yourself in the arbitrator's position—a volunteer whose only purpose is to help you resolve your

dispute. Use common sense about how to proceed.

#### *An Arbitration Checklist*

Given here is a checklist to help you prepare for your arbitration hearing. Use whatever items are appropriate to your case; some may not apply.

1. Collect and bring to the hearing all available written information relating to the car and your dispute, especially those noted below. Bring original documents, if possible, and copies for the arbitrator and for the Volkswagen representative. If you do not have documents, sometimes you can get copies from your repair shop, bank, or credit card company. Remember that, although documents are helpful, you are still eligible for a hearing even if you do not have them. Documents that might be useful include:

- Purchase contract/finance agreements; purchase date, price, etc.;
- Vehicle repair, service, or maintenance records;
- Warranties or service contracts which may be applicable;
- Proof of repair or maintenance payments;
- Correspondence between you and the dealer or manufacturer;
- Copies of the Background Statements which Volkswagen sent you regarding "Oil Usage" or "Engine Damage From Lack of Oil." You may find these fact sheets useful in preparing your presentation. If you have not received the appropriate Background Statements, be sure to get them before the hearing from Volkswagen or from the FTC. (Federal Trade Commission, Division of Enforcement, 6th and Pennsylvania Avenue, NW., Washington, DC 20580.)

2. List any witnesses who may have information about your complaint, such as mechanics or sales personnel. Try to contact them, if you want them to testify in person or to submit written information. You are responsible for your witnesses' submission of information. If you want them to testify in person, keep them informed about the time and place of the hearing.

3. List in chronological order the actions you took to resolve this dispute. Clearly state what the problem is, and why you think the company is responsible.

- To whom did you first speak?
- When did this happen?
- What did they tell you, and/or what action did they take?
- Were other business/service persons involved?

—Who?  
—When?

—Why?

—What did they tell you and/or what action did they take? (Written statements or the presence of witnesses are preferable to your statements, if these are important to your case.)

#### *What Happens After the Arbitrator Makes a Decision?*

The arbitrator may take up to 10 days after the hearing to make a decision. The written decision and the arbitrator's reasons for the judgment will be sent to you. With that decision will be a form which asks you to accept or reject it.

If you accept it, Volkswagen is legally bound to comply. If the arbitrator's decision awards you money, Volkswagen must pay you that amount within 45 days of the date you accept the decision. If the arbitrator orders Volkswagen to repair your car, that repair must be performed within 30 days of the date you accept the arbitrator's decision, unless the arbitrator modifies the deadline for good cause shown.

If you do not think the manufacturer has complied with the decision, you first should contact the BBB or the FTC (Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Avenue, NW., Washington, DC 20580 (202) 376-\_\_\_\_). However, you also may take the award to an appropriate court and have it enforced as if it were a judgment or order of the court—without a rehearing of the case.

If either party believes the final decision contains errors of fact or is unclear, the party may petition the BBB to request the arbitrator to modify or clarify the matter. This is done by making a written request to the BBB which, if it finds the request to have merit, will make a copy for the other party's response, and then will send both documents to the arbitrator. The arbitrator's response to such a request is final.

Of course, if you reject the arbitrator's decision, Volkswagen is not obligated to do anything. You then are free to pursue other legal courses of action.

#### *Confidentiality of Proceedings*

It is BBB policy that the mediation and arbitration process is private and confidential. The BBB will not release results of your case to the media or to any other group or organization. It may, however, release records when this is required by law, by the Federal Trade Commission, or by judicial or governmental administrative proceedings. Records are maintained by the BBB to comply with the audit and

record-keeping requirements of the FTC, which will monitor this program.

If you have any problems or complaints about the arbitration process, contact the Federal Trade Commission, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Avenue, NW., Washington, DC 20580.

#### Attachment G—Brochure for Claimants Describing the Auto Line Program for Internal Engine Component Claims on Volkswagen and Audi Vehicles

##### What is Auto Line?

*Auto Line* is an out-of-court program run by Better Business Bureaus to settle disputes between consumers and certain automobile manufacturers who agree to arbitrate complaints about their products and repairs. It includes a mediation service to settle claims voluntarily.

*Auto Line* is being used to implement a settlement of a 1981 lawsuit between Volkswagen of America and The Federal Trade Commission (FTC). As part of that settlement, Volkswagen will mediate and arbitrate consumer complaints involving the failure, malfunction, repair or replacement of internal engine components on any Volkswagen or Audi vehicle, regardless of model year distributed by Volkswagen of America, warranted in writing by Volkswagen of America, or certified by the manufacturer as meeting applicable federal safety and emissions standards. The engine components subject to the AUTO LINE program consist of all gasoline and diesel engine parts, components, and subassemblies included within the complete short block and cylinder head assemblies, including the short block and cylinder head, camshafts, valve train components, timing gears, flywheels, pistons, piston rings, crankshafts, connecting rods, and bearings, oil pumps, and associated fasteners, seals and gaskets. Because some special provisions apply, this brochure only describes the *Auto Line* program for problems involving engine components on Volkswagen and Audi vehicles.

The FTC/Volkswagen/Audi settlement provides that anyone who owns or leases one of those vehicles at the time the claim is referred to the BBB who has a claim involving one or more of the engine components noted above may use AUTO LINE to resolve it. If the consumer sells the car before the hearing, though, some special procedures must be followed. SEE pages 6-7 for these important instructions. This mediation and arbitration process

is free of charge to the consumer. If efforts at mediation fail, or if the consumer elects to bypass the mediation phase, the BBB-appointed arbitrator will conduct a fact-finding hearing and make a decision in the matter. If the consumer accepts the decision, Volkswagen must do as the arbitrator directs.

This booklet describes the BBB Autoline program and tells you how to participate in the arbitration process.

In addition, Volkswagen has agreed with the FTC to use *Auto Line* to resolve problems involving excessive oil consumption and engine damage due to lack of oil in 1974-1979 Volkswagen and Audi vehicles equipped with water-cooled, gasoline-powered engines. Also, VW has a voluntary program to arbitrate certain complaints for other parts of the car. If your dispute concerns an oil-related problem with the 1974 to 1979 vehicles or a problem with another component (such as the brakes), you must write to Volkswagen or call your local Better Business Bureau to receive a different brochure about these programs.

The *Auto Line* Program offers:

- A mediated resolution of the dispute by BBB staff;
- Arbitration of claims if mediation has been unsuccessful or if the consumer elects to bypass mediation;
- A broad-based pool of trained volunteers from the local community who, as neutral arbitrators, decide the case;
- Arbitrators who are chosen by both the consumer and VW;
- Procedures that are informal and allow consumers to present their own cases.

Under the *Auto Line* Program:

- Mediation is voluntary;
- The arbitration hearing must be completed within 60 days after the consumer enters the program;
- Consumers can present their case in person, by telephone, or in writing;
- Hearings are private unless the consumer agrees to have public observers;
- An on-site vehicle inspection by an independent technical adviser to the arbitrator is available, if necessary;
- Consumers can pursue other available remedies if they do not accept the arbitrator's decision;
- Mediation and arbitration will be monitored by the Federal Trade Commission.

##### How Long Does Auto Line Take?

Volkswagen and the FTC have agreed that specific deadlines shall govern the mediation and arbitration process.

If you elect to mediate your claim, mediation and arbitration, if necessary, shall be completed within 60 days from

the day the BBB receives information stating your model, model year, Vehicle Identification Number and a statement describing the nature of your complaint.

• If the arbitrator orders Volkswagen to give you a money settlement, it must be paid within 45 days of the date you accept the decision.

• If the arbitrator orders Volkswagen to repair your car, the repair must be performed within 30 days of the date you accept the arbitrator's decision, except that the 30 day deadline for repair can be shortened or lengthened at the hearing for good cause shown. These 45- and 30-day deadlines also apply to any settlement you may reach with Volkswagen during the mediation process.

If any of these deadlines are missed, Volkswagen may have violated the agreement between it and the FTC. If this happens, you may inform the FTC (Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Avenue, NW., Washington, DC 20580). However, if a delay is caused by you (for example, if you request an extension of time in which to prepare for your hearing or if you ask that the hearing be rescheduled for a later, more convenient date), that time is not counted.

##### Beginning the Auto Line Program

To enter the *Auto Line* program you must obtain the form entitled "\_\_\_\_\_" from the BBB. To obtain the "\_\_\_\_\_" from the BBB, call the BBB's toll-free number, (800-)\_\_\_\_\_, or write to the BBB at \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_. Tell the BBB your name, address, telephone number, the make and model year of your car, and whether your claim involves an engine component. If you wish to enter the *Auto Line* program, complete the BBB form with as much information as possible and promptly return it to the BBB. Try to include the make, model, year and the Vehicle Identification Number (VIN) of the car, together with a statement describing your problem. These are the most critical pieces of information, but other parts of the form are also important, including what you want VW to do. This must be stated because the arbitrator's authority is limited to what you write on the form. (For example, if you request a refund of \$100, the arbitrator cannot award you more than the amount you have requested.) Remember, also, to enclose copies of any documents you have that may help prove your case. If you no longer have copies of repair bills or cancelled checks, you might contact the repair

shop or your bank or credit card company for copies.

#### *The Mediation Stage*

If you choose to participate in mediation, the BBB will review your claim and then review the position of Volkswagen. The BBB will try to achieve an informal resolution by serving as an intermediary between you and Volkswagen. If you negotiate a settlement with Volkswagen yourself, let the BBB know, so such a settlement can be verified.

Should the BBB mediation efforts fail, an arbitration hearing will be scheduled automatically.

If at any time, you decide that you do not want the BBB to continue seeking a mediated settlement of your complaint, or if you prefer not to try mediation, notify the BBB in writing. In either case, the agreement between the FTC and Volkswagen requires that the arbitration hearing be completed within 60 days of your request for mediation or arbitration.

#### *The Arbitration Process*

It is important for you to know what issues Volkswagen will arbitrate and those which it need not arbitrate. Volkswagen must arbitrate your claims for the cost of completed repairs—including the estimated cost for a repair involving internal engine components that had not been performed but that was still needed when you sold the car (BE SURE to follow the instructions on pages 6-7, if you decide to sell your car), and for expenses related to your complaint. Examples of such expenses include the cost of towing, rental cars, telephone calls, storage fees for your car, and hotel bills. The maximum amount you may claim is what you paid for the car plus related expenses.

Issues that may not be arbitrated in the BBB program include punitive damages, loss of business income, insurance claims, personal injury and property damage claims, and allegations of fraud or other violations of criminal law. Such issues are best dealt with in a court of law, and you are free to pursue such claims outside the context of arbitration.

Remember, this brochure only covers the program to resolve engine problems. If your complaint concerns another component, you may be eligible under VW's voluntary program. Call your local BBB office for details.

#### *Who Are the Arbitrators?*

Thousands of volunteers from all walks of life serve the BBB as arbitrators—decision makers—in these cases. They include professionals,

educators, retirees, lawyers, housewives, and others, who have gone through a special training program. Arbitrators are not employed by the BBB, nor are they paid for their services. They perform this duty as a public service. All arbitrators are required to disclose, as a condition of hearing a case, any financial, commercial, professional, social or familial relationship—no matter how remote—with any of the parties or their counsel. No more than one-third of the arbitrators on the selection list sent to you by the BBB may be persons at a supervisory level in a company that makes, services, or sells a product. In all cases, your dispute will be decided by someone who is completely independent and has no vested interest in the outcome.

#### *Choosing an Arbitrator*

Although State law and BBB policies offer various means of choosing arbitrators, normally you will be given a list of trained community volunteers together with a brief biography of each. You will be asked to cross off any arbitrator with whom you may have a business, financial, or social relationship, to select the arbitrator who is your first choice, and to indicate your priority preference ("2," "3," etc.) for the remaining names. The highest overlapping priority choices of both parties usually becomes the arbitrator. Where State law requires it, a panel of three arbitrators may decide your case. In this situation, your first choice and Volkswagen's first choice for an arbitrator will be appointed to the panel, along with a third arbitrator who was not crossed off by either party.

After you have returned your arbitrator choices to the BBB, along with an indication of the times when you will not be available to attend a hearing, the BBB will tell you when and where the hearing is to be held. If you have chosen to present your case in writing or by telephone, you also must make that choice known to the BBB.

#### *What Does Arbitration Cost?*

The agreement between Volkswagen and the FTC requires Volkswagen to pay the costs of AUTO LINE. You will have no costs unless you choose to bring your own paid witnesses or retain an attorney. Copies of records and documents that are a part of the hearing will be available to you at any time for a reasonable cost. Also, if you want a recording of the entire proceedings, you must pay recording expenses.

#### *The Hearing*

The actual hearing is an informal session. It is designed to ensure that you and Volkswagen's representative get a full opportunity to describe the dispute to the arbitrator.

Normally, arbitration hearings are held at the BBB during regular working hours; however, the BBB will schedule a time and place convenient to you and to the others involved.

The hearings usually feature in-person presentations, during which each side presents its case to an arbitrator and all have an opportunity to ask questions, including the arbitrator. Most consumers choose to have in-person hearings, and the BBB believes this is the best way of getting all the facts before the arbitrator. However, you also have the option of presenting your case by telephone or in writing.

A Volkswagen representative usually will attend the hearing to present its case. However, Volkswagen, at its option, also may choose to present its case by telephone or mail (if you appear in person), or by mail (if you present your case by telephone). You always may present your case in person, even if Volkswagen does not.

You may be represented by an attorney or other spokesperson, bring witnesses and present documents, bills, and any other information to prove your case. If you are being represented by a lawyer, tell the BBB as soon as possible so that Volkswagen can be given an opportunity to get legal counsel.

At no time may you or your representative or Volkswagen or its representative contact the arbitrator without the other party being present. All communications relating to the arbitration must be directed through the BBB. It will forward all information and make sure the other side gets copies when necessary.

#### *When Are Inspections and Technical Advisers Involved?*

Sometimes the arbitrator will want to see the car or the repair work to get a full understanding of the facts. The BBB will send you a notice of the inspection time and place. You should be present for such an inspection, and you have a right to bring your own expert if you wish. Should the arbitrator request a technical adviser, the BBB will identify experts in the community who have no relationship with any party and are not potential competitors of Volkswagen.

#### *What To Do If You Want To Sell Your Car Right Away*

If you decide to sell your car after you notify the BBB, but before the arbitration

hearing, this is what you must do to remain eligible for the arbitration program:

1. You must notify Volkswagen at least ten days in advance that you intend to sell the vehicle; and

2. You must give Volkswagen an opportunity to inspect the vehicle before it is sold;

If you sell the vehicle before the problem that prompted the claim is repaired, your recovery will be limited to the estimated repair costs (plus expenses for towing, storage fees, rental car costs, telephone and hotel bills);

If you arbitrate a claim for an unrepaired problem on a car that you sold, the party that had the problem repaired is not eligible for arbitration for that problem; likewise, you may not arbitrate a claim for which a previous owner of the car had already accepted an arbitration award.

#### *How To Prepare For Arbitration?*

Before coming to the hearing, you should prepare an outline of your argument to help you in your presentation. In that way, you won't forget important points in your favor. To assist you in your preparation, a checklist is given at the end of this section.

Also, before coming to the hearing, you should prepare a list of questions you want to ask Volkswagen. During the hearing, you can add to your list of questions. Include anything new that occurs to you when you hear what the other side has to say.

After you state the facts as you see them, Volkswagen has a right to ask you questions. After Volkswagen has stated the facts as they see them, you have the same right to ask them questions. To clarify uncertain areas and to gain a fuller understanding of the dispute, the arbitrator also is trained to ask questions.

After each side has presented its case and the questioning is completed, you should be prepared to give a summary of your position. Try to describe the weak points in Volkswagen's case, deal with any questions that have not otherwise been answered, and tell the arbitrator exactly what kind of decision you want and why.

Remember that the sole purpose of the hearing is to allow the arbitrator to gather and sort the facts and thus make a fair decision. You should be prepared to convince the arbitrator that your position is right and that your opponent's is wrong.

A friendly, sincere approach works best. You are there because you and Volkswagen have a disagreement, but keep that disagreement factual and

within the bounds of normal courtesy and conventional language. Bombarding an arbitrator with technical jargon will not be productive, nor will rudeness, arguing with the arbitrator, or belittling your opponent. Put yourself in the arbitrator's position—a volunteer whose only purpose is to help you resolve your dispute. Use common sense about how to proceed.

#### *An Arbitration Checklist*

Given here is a checklist to help you prepare for your arbitration hearing. Use whatever items are appropriate to your case; some may not apply.

1. Collect and bring to the hearing all available written information relating to the car and your dispute, especially those noted below. Bring original documents, if possible, and copies for the arbitrator and for the Volkswagen representative. If you do not have documents, sometimes you can get copies from your repair shop, bank, or credit card company. Remember that, although documents are helpful, you are still eligible for a hearing even if you do not have them. Documents that might be useful include:

- Purchase contract/finance agreements; purchase date, price, etc.;
- Warranty;
- Vehicle repair, service, or maintenance records;
- Proof of repair or maintenance payments;

• Correspondence between you and the dealer or manufacturer;

2. List any witnesses who may have information about your complaint, such as mechanics or sales personnel. Try to contact them, if you want them to testify in person or to submit written information. You are responsible for your witnesses' submission of information. If you want them to testify in person, keep them informed about the time and place of the hearing.

3. List in chronological order the actions you took to resolve this dispute. Clearly state what the problem is, and why you think the company is responsible.

- To whom did you first speak?
- When did this happen?
- What did they tell you, and/or what action did they take?
- Were other business/service persons involved?
- Who?
- When?
- Why?
- What did they tell you and/or what action did they take? (Written statements or the presence of witnesses are preferable to your statements, if these are important to your case.)

#### *What Happens After the Arbitrator Makes a Decision?*

The arbitrator may take up to 10 days after the hearing to make a decision. The written decision and the arbitrator's reasons for the judgment will be sent to you. With that decision will be a form which asks you to accept or reject it.

If you accept it, Volkswagen is legally bound to comply. If the arbitrator's decision awards you money, Volkswagen must pay you that amount within 45 days of the date you accept the decision. If the arbitrator orders Volkswagen to repair your car, that repair must be performed within 30 days of the date your acceptance of the arbitrator's decision is received by the BBB, unless the arbitrator rules, for good cause, that the 30 day deadline should be modified.

If you do not think the manufacturer has complied with the decision, you first should contact the BBB or the FTC (Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Avenue, NW., Washington, DC 20580 (202) 376-\_\_\_\_). However, you also may take the award to an appropriate court and have it enforced as if it were a judgment or order of the court—without a rehearing of the case.

If either party believes the final decision contains errors of fact or is unclear, the party may petition the BBB to request the arbitrator to modify or clarify the matter. This is done by making a written request to the BBB which, if it finds the request to have merit, will make a copy for the other party's response, and then will send both documents to the arbitrator. The arbitrator's response to such a request is final.

Of course, if you reject the arbitrator's decision, Volkswagen is not obligated to do anything. You then are free to pursue other legal courses of action.

#### *Confidentiality of Proceedings*

It is BBB policy that the mediation and arbitration process is private and confidential. The BBB will not release results of your case to the media or to any other group or organization. It may, however, release records when this is required by law, by the Federal Trade Commission, or by judicial or governmental administrative proceedings. Records are maintained by the BBB to comply with the audit and record-keeping requirements of the FTC, which will monitor this program.

If you have any problems or complaints about the arbitration process, contact the Federal Trade

Commission, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Avenue, NW., Washington, DC 20580.

**Attachment H(1)—Volkswagen Arbitration Program Advertisement**  
(Graphics Omitted)

Now, every Volkswagen is even more responsive.

At Volkswagen, we're proud to produce automobiles that are known for performance as well as value. Performance is important to us as a company, too.

For example, in the unlikely event a Volkswagen doesn't perform up to your expectations, we've set up a program to make sure you get a prompt response. And a fair one. In cooperation with the Council of Better Business Bureaus, we have a free third-party arbitration program. The program benefits all current and, in some cases, *former Volkswagen owners*.

To resolve a problem quickly, first see your Volkswagen dealer. Or call 1-800-822-8987 to see if our problem-solving program can work for you.

We hope you'll never need this responsive program. But it's available if you do.

GOLF • GTI • JETTA • CABRIOLET • SCIROCCO • QUANTUM • VANAGON

**Attachment H(2)—Audi Arbitration Program Advertisement**

It comes with an option we don't think you'll ever ask for.

That option is a special third-party arbitration program that the people of Audi have arranged with the Better Business Bureau.

At Audi, we've been consistently producing technologically advanced automobiles of the highest quality for over fifty years. And we take great pride in our tradition of excellent service.

But, if for some reason, you should ever need an extra voice in solving any product related questions, all you have to do is call toll-free 1-800-822-8987.

The program benefits all current and, in some cases, *former Audi owners*. Of course, the program is free. Just ask your dealer for the complete details.

Naturally, the first step in solving any problem is your owner's manual, and then your dealer and your nearest Audi of America Regional Office.

But it never hurts to have an extra option even if you never choose to exercise it.

AUDI

The art of engineering.

(GRAPHICS OMITTED)

**Attachment I(1)—Volkswagen Arbitration Program Poster**

TEXT AND GRAPHICS OF ATTACHMENT H(1), WITH THE FOLLOWING MODIFICATION:

WITHIN TEXT, ASTERISK AT "former owners"

BENEATH AD TEXT, ON PLAIN BACKGROUND, IN SAME TYPE SIZE AS TEXT OF PRINT AD: "Previous owners of 1974-1979 watercooled VW vehicles with gasoline engines who have claims for unsatisfactory oil consumption or engine damage from lack of lubrication are also eligible for our program."

**Attachment I(2)—Audi Arbitration Program Poster**

TEXT AND GRAPHICS OF ATTACHMENT H(2), WITH THE FOLLOWING MODIFICATION:

WITHIN TEXT, ASTERISK AT "but once did."

BENEATH AD TEXT, ON PLAIN BACKGROUND, IN SAME TYPE SIZE AS TEXT OF PRINT AD: "Previous owners of 1974-1979 Audi vehicles with gasoline engines who have claims for unsatisfactory oil consumption or engine damage from lack of lubrication are also eligible for our program."

**Analysis of Proposed Consent Order to Aid Public Comment**

The Federal Trade Commission has accepted an agreement to a proposed consent order from Volkswagen of America.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The proposed consent order settles a complaint, issued by the Commission in April 1981, that charged Volkswagen of America and its parent firm, Volkswagen AG, with failing to disclose material product information about various oil-related engine problems to prospective purchasers and owners of 1974-1979 Volkswagen and Audi vehicles equipped with water-cooled gasoline engines. The complaint charged that Volkswagen knew or should have known of the conditions that led to the oil-related problems, but failed to disclose them. According to the complaint, the failure to disclose these conditions led to substantial consumer

injury and was deceptive and unfair within the meaning of Section 5 of the Federal Trade Commission Act.

The proposed order contains two principal requirements. Volkswagen of America will be required to institute a system of broader and more effective disclosure of product information for its vehicles sold since the beginning in the 1984 model year. Volkswagen of America will also be required to offer arbitration to consumers through an impartial and independent third-party for the oil-related problems in 1974-79 vehicles described in the complaint and for internal engine components for any Volkswagen of Audi vehicle distributed by Volkswagen of America.

The principal requirements are based on similar provisions contained in a previous order the Commission accepted against General Motors Corp. in 1983. *General Motors*, D. 9145. There are substantial differences, however, between this order and the *GM* order to account for differences in the facts of the two cases, different corporate structures, and the experience the Commission has had in enforcing the *General Motors* order.

The product information disclosure program requires that Volkswagen of America make available to the public bulletins that it routinely sends to its dealers. In addition, VWoA must prepare and make available indexes of the bulletins and easy-to-understand summaries of the more significant bulletins.

Consumers will learn about existence of the program through a statement placed on the federally mandated retail price and gasoline mileage window sticker placed on each new car, a statement in each owner's manual, and references to the program in brochures and other promotional materials.

The product information program will assist prospective purchasers of new cars in making informed judgments about Volkswagen of America's vehicles. The indexes, bulletins, and summaries will also be useful to owners of vehicles who want to understand better any problems they are having with their vehicles and who want to use and maintain their cars according to the latest, most accurate recommendations.

The second principal requirement of the order is an arbitration program for resolving complaints concerning engines in Volkswagen of America's vehicles. The program must be administered by an independent and impartial third-party. Volkswagen presently contemplates that the Council of Better Business Bureaus, Inc. will be the administrator of the program.

There are two parts of the program. Owners and lessees of 1974-1979 VWs and Audis with water-cooled gasoline engines will be eligible to arbitrate their claims for repairs caused by excessive oil consumption and engine damage due to lack of lubrication. Consumers will be eligible regardless of whether they still own the car. Volkswagen will be required to notify consumers by first-class mail who have previously complained to the FTC, to Volkswagen or to other third-parties. In addition, there are two "Background Statements" which consumers will receive to assist in pressing their claims. The Background Statements describe in detail the oil-related problems and present opposing views of the FTC and Volkswagen on controverted issues. The Background Statements should prove useful in focusing the issues in arbitrations and in enabling consumers to make effective arguments to arbitrators. The Background Statements will also enable consumers to evaluate the strengths of their cases in deciding whether to accept settlement offers that Volkswagen may make to resolve claims prior to arbitrations.

The other part of the arbitration program permits owners and lessees of any make or model of Volkswagen or Audi vehicles to arbitrate claims involving internal engine components. Claims under this portion of the program will be handled in much the same way as the oil-related claims discussed above. However, there will not be any Background Statements and the consumer must still own or lease the vehicle at the time the claim is made to the third-party administrator.

For both parts of the arbitration program, the arbitration hearing must be completed within 60 days after the consumer enters the program. The arbitration award is binding on the consumer and Volkswagen only if the consumer decides to accept it. Moreover, the arbitration program is available even if warranty coverage has already expired.

In addition to the direct mail notices required to be sent to consumers for oil-related complaints, Volkswagen of America will be required to place advertisements in national magazines promoting the availability of arbitration, and specifically highlighting the availability of arbitration for certain past claims. VWoA will also be required to distribute posters to its dealers promoting the availability of arbitration. Owner's manuals for VWoA's vehicles must also state that arbitration is available to remedy past and future internal engine component complaints.

The arbitration program required by the order should be an effective mechanism for resolving complaints that are covered by the order. The order has been drafted so that the arbitration hearings will be completed expeditiously, simply and fairly. The arbitration program will be free of charge to the consumer for the first two years of the program. After that a charge may be imposed if the BBB's rules for arbitration are modified. The arbitration program will also save time and expense because consumers will not need a lawyer.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Emily H. Rock,  
Secretary.

**Concurring Statement of Chairman  
Daniel Oliver in Volkswagen of  
America, Inc.**

[Docket No. 9154]

The consent order negotiated by the staff contains a number of injunctive relief provisions, and provides consumer redress in the form of a Commission-supervised arbitration process administered by the Better Business Bureau. Although, I believe these provisions satisfy the Commission's concerns in this matter, the negotiated order is not one I would have chosen. However, I am reluctant to suggest order revisions, as they might throw this matter back into the costly litigation which has already consumed many years of Commission resources. Accordingly, I vote in favor of the staff's negotiated consent order.

I would have preferred an order without the prospective redress provisions provided in the order's arbitration mechanism. The negotiated mechanism resolves not only consumer disputes regarding the defects cited in the complaint, but also other internal engine component problems. Although this mechanism is similar to the relief obtained from another automobile manufacturer in a related matter (see *General Motors* consent order, D-9145), I do not favor its general application, for two reasons.

First, the arbitration mechanism is needlessly regulatory. If Volkswagen wants to negotiate consumer complaints through a Better Business Bureau arbitration scheme, it should certainly be free to do so. However, active government supervision of such a scheme forces government to maintain

an active presence in the operation of a domestic auto seller for the next 8 years.

Second, to the extent the negotiated order provides prospective redress, it will provide relief primarily to consumers who were not injured by the violations alleged in the complaint. In future consent orders where consumer redress is warranted, I would find it preferable for staff to negotiate for redress that confers benefits on the injured parties.

Issued: March 31, 1987.

[FR Doc. 87-9982 Filed 5-12-87; 8:45 am]  
BILLING CODE 6750-01-M

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

#### 25 CFR Part 22

#### Care of Indian Children in Contract Schools; Proposed Removal of Part

March 23, 1987.

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** The Bureau of Indian Affairs is proposing to remove Part 22 in its entirety from Chapter I, Title 25 of the Code of Federal Regulations. The Bureau of Indian Affairs no longer provides for the support of Indian children who require institutional care through the method described in this rule. Current procedures governing this program appear in 25 CFR Part 23; therefore, there is no further need for or applicability of the rule in this part.

**DATE:** Comments must be submitted on or before June 12, 1987.

**ADDRESS:** Written comments may be mailed or delivered to Ms. Hazel Elbert, Deputy to the Assistant Secretary-Indian Affairs (Tribal Services), Room 4600 Main Interior, Bureau of Indian Affairs, Department of the Interior, 18th and C Streets, NW., Washington, DC 20245.

**FOR FURTHER INFORMATION CONTACT:** Mr. Larry Blair, Division of Social Services, Bureau of Indian Affairs, telephone number (202) 343-6434.

**SUPPLEMENTARY INFORMATION:** This proposed rule is published in exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary-Indian Affairs by 209 DM 8.

The Bureau of Indian Affairs is proposing to remove 25 CFR Part 22 in its entirety. The rule provides for contracts to missions and institutions to provide for the care of Indian children

who reside within the exterior boundaries of Indian reservations or on trust or restricted lands under the jurisdiction of the Bureau of Indian Affairs. The Bureau no longer provides for the support of Indian children who require institutional care through the method provided under this rule. Current procedures governing the care of Indian children appear in the implementing regulations for the Indian Child Welfare Act, 25 CFR Part 23, and Chapter 66 of the Bureau of Indian Affairs' Manual. Therefore, there is no further need for or applicability of the rule in Part 22.

The policy of the Department of the Interior is, whenever practical, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments regarding the proposed rule to the locations identified in the Addresses section of this preamble.

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). This proposed rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment and no detailed statement is required pursuant to the National Environmental Policy Act of 1969.

This Part contains information collections, however, because this Part is being removed, the information collection requirements will not require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

#### List of Subjects in 25 CFR Part 22

Government contracts, Indians, Social welfare, Indians, Education, Schools.

For the reasons set out in the preamble, Part 22 of Title 25, Chapter I of the Code of the Federal Regulations is proposed for removal as set forth below:

#### PART 22—[REMOVED AND RESERVED]

1. The authority citation for 25 CFR Part 22 continues to read as follows:

Authority: 5 U.S.C. 301.

2. Part 22 is proposed for removal in its entirety and reserved.

Ross O. Swimmer,

Assistant Secretary, Indian Affairs.

[FR Doc. 87-10864 Filed 5-12-87; 8:45 am]

BILLING CODE 4310-02-M

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 301

[LR-72-86]

#### Procedure and Administration; Reduction of Tax Overpayments by Amount of Past-Due Legally Enforceable Debt Owed to Federal Agency

**AGENCY:** Internal Revenue Service, Treasury.

**ACTION:** Notice of proposed rulemaking by cross-reference to temporary regulations.

**SUMMARY:** In the Rules and Regulations portion of this issue of the *Federal Register*, the Internal Revenue Service is issuing temporary regulations which amend temporary regulations which were published in the *Federal Register* September 30, 1985 relating to the reduction of a taxpayer's overpayment (*i.e.*, tax refund) by the amount of any past-due legally enforceable debt owed to a Federal agency by the taxpayer and referred by that agency to the Internal Revenue Service for offset. The text of the temporary regulations also serves as the comment document for this notice of proposed rulemaking.

**DATES:** Written comments and requests for a public hearing must be delivered or mailed by July 13, 1987. The regulations are proposed to apply to refunds payable under section 6402 of the Internal Revenue Code of 1954 after December 31, 1985, and before January 1, 1988 and are effective upon publication.

**ADDRESS:** Send comments and requests for a public hearing to: Commissioner of Internal Revenue, Attention: CC:LR:T (LR-291-84), Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Sharon L. Hall of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224 (Attention: CC:LR:T), (202) 566-3288 (not a toll-free call).

#### SUPPLEMENTARY INFORMATION:

##### Background

The temporary regulations (designated by a "T" following the section citation) in the Rules and Regulations section of this issue of the *Federal Register* amend temporary Procedure and Administration Regulations (26 CFR Part 301) under section 6402 (d) and (e) of the Internal Revenue Code of 1954, and section 3720A of subchapter II of chapter 37 of

title 31, United States Code. This document proposes to adopt the amendments to those temporary regulations as amendments to the final regulations; accordingly, the text of the temporary regulations serves as the comment document for this notice of proposed rulemaking. In addition, the preamble to the temporary regulations provides a discussion of the proposed and temporary amendments. For the text of the temporary regulations, see FR Doc. 87-10917 (T.D. 8139) published in the Rules and Regulations section of this issue of the *Federal Register*.

#### Special Analyses

The Commissioner of Internal Revenue has determined that these proposed rules are not major rules as defined in Executive Order 12291 and, therefore, a regulatory impact analysis is not required. Although this document is a notice of proposed rulemaking that solicits public comment, the Internal Revenue Service has concluded that the regulations proposed herein are interpretative and that the notice and public procedure requirements of 5 U.S.C. 553 do not apply. Accordingly, these proposed regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

#### Comments and Requests for a Public Hearing

Before these proposed regulations are adopted, consideration will be given to any written comments that are submitted (preferably eight copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Commissioner by any person who has submitted written comments. If a public hearing is held, notice of the time and place will be published in the *Federal Register*.

#### Drafting Information

The principal author of these proposed regulations is Sharon L. Hall of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations on matters of both substance and style.

#### List of Subjects in 26 CFR Part 301

Administrative practice and procedure, Bankruptcy, Courts, Crime, Employment taxes, Estate taxes, Gift taxes, Income taxes, Investigations, Law

enforcement, Penalties, Pensions, Statistics, Taxes, Disclosure of information, Filing requirements.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

[FR Doc. 87-10918 Filed 5-12-87; 8:45 am]

BILLING CODE 4830-01-M

## DEPARTMENT OF DEFENSE

### Corps of Engineers, Department of the Army

#### 33 CFR Part 334

#### Danger Zone, James and Warwick Rivers, VA

**AGENCY:** U.S. Army Corps of Engineers, DoD.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Corps of Engineers proposes to establish a danger zone to protect the public from dangers associated with firing range use at Ft. Eustis, VA.

**DATE:** Comments must be submitted on or before June 12, 1987.

**ADDRESS:** HQDA, DAEN-CWO-N, Washington, DC 20314-1000.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mark Harrell at (804) 441-3653 or Mr. Ralph Eppard at (202) 272-1783.

#### SUPPLEMENTARY INFORMATION:

The Commander, U.S. Army Transportation Center and Ft. Eustis, VA, has requested the Corps of Engineers establish a danger zone in the James River and Warwick River adjacent to Mulberry Island, Ft. Eustis, VA. The intent of this proposed danger zone is to provide a safety buffer zone around the existing firing ranges where the impact area of the firing range cross the James and Warwick Rivers.

The area will remain open for the passage of vessels. Commercial fisherman will not be prohibited from working within the area.

#### Notes

1. The Corps of Engineers has determined that this rule is not a major rule within the meaning of Executive Order 12291 and is exempt from the general requirements of Executive Order 12291 in accordance with the exemption provided military functions.

2. I hereby certify that this rule will not have a significant economic effect impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 33 CFR Part 334

Navigation, Waterways, Transportation.

For the reasons set out in the preamble, Title 33, Chapter II, Part 334 is amended as follows:

#### PART 334—DANGER ZONES AND RESTRICTED AREA REGULATIONS

1. The authority citation for Part 334 continues to read as follows:

Authority: 40 Stat. 266 (33 U.S.C. 1) and 40 Stat. 892 (33 U.S.C. 3).

2. Section 334.281 is proposed to be added as follows:

#### § 334.281 James and Warwick Rivers, off Mulberry Island, Ft. Eustis, VA; danger zone.

(a) *The area.* All the water area channelward of the mean high water shoreline within an area beginning on shore at latitude 37°06'43" N, Longitude 76°34'09" W; thence southeasterly to latitude 37°05' N, longitude 76°32'50" W; thence southerly to latitude 37°04'32" N, longitude 76°32'55" W; thence southwesterly to latitude 37°04'24" N, longitude 76°33'19" W; thence westerly to latitude 37°04'27" N, longitude 76°33'55" W, thence northwesterly to latitude 37°07'33" N, longitude 76°37'44" W ending at Mulberry Point.

(b) *The regulations.* (1) During periods when firing is in progress, red flags will be displayed at conspicuous locations on shore. Observers will be on duty and firing will be suspended as long as any vessel is within the danger zone.

(2) Passage of vessels through the area will not be prohibited at any time, nor will commercial fishermen be prohibited from working within the area. No loitering or anchoring for other purposes will be permitted during announced firing periods.

(3) No firing will be done during hours of low visibility or darkness.

(4) The Commander, Ft. Eustis, VA, is responsible for furnishing the firing schedule to the Commander (oan), 5th Coast Guard District, for publication in the "Local Notice to Mariners" and to the local press at Newport News, and Isle of Wight County, VA, in advance of firing range use.

(5) The regulations in this section shall be enforced, by the Commander, U.S. Army Transportation Center and Ft. Eustis, VA, or such agencies as he/she may designate.

Dated: March 20, 1987.

Approved:

Joseph T. Larremore,  
Colonel, Corps of Engineers, Executive  
Director of Civil Works.

[FR Doc. 87-10863 Filed 5-12-87; 8:45 am]

BILLING CODE 3710-92-M

## DEPARTMENT OF DEFENSE

### VETERANS ADMINISTRATION

#### 38 CFR Part 21

#### Veterans Education; Entitlement Charges for Overpayments Under VEAP

**AGENCY:** Veterans Administration and Department of Defense.

**ACTION:** Proposed regulations.

**SUMMARY:** Interest, administrative costs of collection, court costs, and marshal fees are not being charged on overpayments of educational assistance allowance. At times a veteran will discharge such a debt in bankruptcy, or the debt will be waived or compromised. This proposal would amend the pertinent section of the Code of Federal Regulations to provide that when any of these actions occurs with regard to a debt incurred under VEAP (the Post-Vietnam Era Veterans Educational Assistance Program), an unrecovered portion of interest, administrative costs of collection, court costs or marshal fees will not result in a charge against a veteran's entitlement to educational assistance allowance.

**DATE:** Comments must be received on or before June 9, 1987.

**ADDRESSES:** Send written comments to: Administrator of Veterans Affairs (271A), Veterans Administration, 810 Vermont Avenue NW., Washington, DC 20420. All written comments received will be available for public inspection only in the Veterans Services Unit, room 132 of the above address, between the hours of 8 a.m. to 4:30 p.m., Monday through Friday (except holidays) until June 22, 1987.

**FOR FURTHER INFORMATION CONTACT:** June C. Schaeffer, Assistant Director for Education Policy and Program Administration, Vocational Rehabilitation and Education Service, Department of Veterans Benefits, (202) 233-2092.

**SUPPLEMENTARY INFORMATION:** 38 CFR 21.5076 is amended to show how the Veterans Administration (VA) will calculate the charge against entitlement when a veteran's overpayment of educational assistance allowance under VEAP is discharged in bankruptcy, or is waived or is compromised.

The VA has determined that this proposed amended regulation does not contain a major rule as that term is defined by E.O. 12291, entitled Federal Regulation. The proposed amended regulation will not have a \$100 million annual effect on the economy, and will not cause a major increase in costs or prices for anyone. It will have no

significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Administrator of Veterans Affairs has certified that this proposed amended regulation, if promulgated, will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612. Pursuant to 5 U.S.C. 605(b), the proposed amended regulation, therefore, is exempt from the initial and final regulatory flexibility analyses requirements of §§ 603 and 604.

This certification can be made because the proposed amended regulation affects only individuals. It will have no significant economic impact on small entities, i.e., small businesses, small private and nonprofit organizations and small governmental jurisdictions.

The Catalog of Federal Domestic Assistance number for the program affected by this proposed amended regulation is 64.120.

#### List of Subjects in 38 CFR Part 21

Civil rights, Claims, Education, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Schools, Veterans, Vocational education, Vocational rehabilitation.

Approved: January 15, 1987.

Thomas K. Turnage,  
Administrator.

Approved: March 9, 1987.

A. Lukeman,  
Deputy Assistant Secretary of Defense.

#### PART 21—[AMENDED]

In 38 CFR Part 21, *Vocational Rehabilitation and Education*, § 21.5076 is proposed to be revised as follows:

##### § 21.5076 Entitlement charge—overpayment cases.

(a) *Overpayment cases.* The VA will make a charge against an individual's entitlement of an overpayment of educational assistance allowance only if:

- (1) The overpayment is discharged in bankruptcy; or
- (2) The VA waives the overpayment and does not recover it; or
- (3) The overpayment is compromised. (38 U.S.C. 1631)

(b) *Debt discharged in bankruptcy or is waived.* If the overpayment is discharged in bankruptcy or is waived and is not recovered, the entitlement

charge will be at the appropriate rate for the elapsed period covered by the overpayment (exclusive of interest, administrative costs of collection, court costs and marshal fees). (38 U.S.C. 1631; Pub. L. 94-502)

(c) *Overpayment is compromised.* (1) If the overpayment is compromised and the compromise offer is less than the amount of interest, administrative costs of collection, court costs and marshal fees, the charge against entitlement will be at the appropriate rate for the elapsed period covered by the overpayment (exclusive of interest, administrative costs of collection, court costs and marshal fees).

(2) If the overpayment is compromised and compromise offer is equal to or greater than the amount of interest, administrative costs of collection, court costs and marshal fees, the charge against entitlement will be determined by—

(i) Subtracting from the sum paid in the compromise offer the amount attributable to interest, administrative costs of collection, court costs and marshal fees.

(ii) Subtracting the remaining amount of the overpayment balance determined in paragraph (c)(2)(i) of this section from the amount of the original overpayment (exclusive of interest, administrative costs of collection, court costs and marshal fees).

(iii) Dividing the result obtained in paragraph (c)(2)(ii) of this section by the amount of the original debt (exclusive of interest, administrative costs of collection, court costs and marshal fees), and

(iv) Multiplying the percentage obtained in paragraph (c)(2)(iii) of this section by the amount of the entitlement otherwise chargeable for the period of the original overpayment. (38 U.S.C. 1631)

[FR Doc. 87-10710 Filed 5-12-87; 8:45 am]  
BILLING CODE 8320-01-M

#### ENVIRONMENTAL PROTECTION AGENCY

##### 40 CFR Part 300

[FRL-3199-7]

#### The National Priorities List-Listing Policy for Federal Facilities

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed policy.

**SUMMARY:** The Environmental Protection Agency ("EPA") is proposing a policy relating to the National Oil and

Hazardous Substances Contingency Plan ("NCP"), which was promulgated on July 16, 1982 pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") and Executive Order 12316, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA).

CERCLA requires that the NCP include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, and contaminants throughout the United States, and that the list be revised at least annually. The National Priorities List (NPL), initially promulgated as Appendix B of the NCP on September 8, 1983 (48 FR 40658), constitutes this list and meets those requirements.

This notice solicits comments on a proposed policy for placing on the NPL sites located on Federally-owned facilities that are subject to the corrective action authorities of the Resource Conservation and Recovery Act (RCRA). These NPL sites may encompass the entire Federal facility or portions of it depending on the size and characteristics of the facility.

**DATE:** Comments may be submitted on or before June 12, 1987.

**ADDRESSES:** Comments may be mailed to Stephen Lingle, Director, Hazardous Site Evaluation Division (Attn: NPL Staff), Office of Emergency and Remedial Response (WH-548E), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

#### FOR FURTHER INFORMATION CONTACT:

C. Scott Parrish, Hazardous Site Evaluation Division, Office of Emergency and Remedial Response (WH-548E), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, Phone (800) 424-9346 (or 382-3000 in the Washington, DC, metropolitan area).

#### SUPPLEMENTARY INFORMATION:

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- I. Introduction
- II. Contents of This Proposed Policy

##### I. Introduction

Pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. sections 9601-9657 ("CERCLA or the Act"), and Executive Order 12316 (46 FR 42237, August 20, 1981), the Environmental Protection Agency ("EPA" or "the Agency") promulgated the revised National Oil and Hazardous Substances Contingency Plan ("NCP"), 40 CFR Part 300, on July

16, 1982 (47 FR 31180). EPA promulgated further revisions to the NCP on September 16, 1985 (50 FR 37624) and November 20, 1985 (50 FR 47912). These amendments to the NCP implemented responsibilities and authorities created by CERCLA to respond to releases and threatened releases of hazardous substances, pollutants, and contaminants.

Section 105(8)(A) of CERCLA requires that the NCP include criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial or removal action. Removal action involves cleanup or other actions that are taken in response to releases or threats of releases on a short-term or temporary basis (CERCLA section 101(23)). Remedial action tends to be long-term in nature and involves response actions which are consistent with a permanent remedy for a release (CERCLA section 101(24)). The Agency developed the Hazard Ranking System (HRS) to implement section 105(8)(A). The HRS was codified as Appendix A of the NCP.

Section 105(8)(B) of CERCLA requires that the statutory criteria described in the HRS be used to prepare a list of national priorities among the known releases or threatened releases throughout the United States. The list, which is Appendix B of the NCP, is the National Priorities List (NPL). Section 105(8)(B) also requires that the NPL be revised at least annually. An initial NPL of 406 sites was promulgated on September 8, 1983 (48 FR 40658). The NPL has been amended several times since then. Currently, there are 703 sites on, and 248 sites proposed for, the NPL.

Under section 300.68(a) of the NCP, a site must be on the NPL if a remedial action is to be financed by the Hazardous Substances Superfund set up under the Superfund Amendments and Reauthorization Act of 1986 (SARA) (this supersedes the Hazardous Response Trust Fund originally set up under CERCLA). CERCLA section 111(e)(3) prohibits the use of the Fund for remedial actions at Federal facilities. However, pursuant to section 300.66(e)(2) of the NCP, the Agency can place Federal facility sites on the NPL. The Agency decided to place Federal facility sites on the NPL in order to inform the public about responses undertaken at facilities (50 FR 47931, November 20, 1985). Currently, 48 Federal facility sites have been proposed for the NPL.

## II. Contents of This Proposed Policy

Today's proposal would allow including on the NPL Federal facility

sites that may be subject to the corrective action authorities of the Resource Conservation and Recovery Act (RCRA).

When the initial NPL was promulgated, the Agency announced certain eligibility policies relating to sites that might qualify for the NPL. One of these policies was that RCRA "regulated units"—i.e., land disposal units that received hazardous waste after the effective date of the RCRA land disposal regulations (48 FR 40662, September 8, 1983)—would not be included on the NPL. On April 10, 1985 the Agency proposed a revision of that policy based upon expanded RCRA authorities enacted as part of the Hazardous and Solid Waste Amendments of 1984 (50 FR 14117, April 10, 1985).

On June 10, 1986 (51 FR 21057), EPA announced several components of a final policy for placing non-Federal RCRA-related sites on the NPL. In general, a listing of non-Federal sites with releases that can be addressed under the expanded RCRA Subtitle C corrective action authorities will be deferred. The Agency stated, however, that certain sites subject to Subtitle C corrective action requirements should be listed if they have an HRS score of 28.50 or greater and meet at least one of the following criteria: (1) Facilities owned by persons who are bankrupt; (2) facilities that have lost RCRA interim status and for which there are additional indications that the owner or operator will be unwilling to undertake corrective action; and (3) sites, analyzed on a case-by-case basis, whose owners or operators have shown an unwillingness to undertake corrective action.

At that time, EPA also announced that it would consider, at a later date, whether this revised policy should apply to Federal facilities (51 FR 21059, June 10, 1986). Subsequently, the Agency has analyzed the appropriateness of deferring the listing of Federal facility sites which may be subject to RCRA corrective action. In its deliberations, EPA considered the policy announced on March 5, 1986 (51 FR 7722) concerning RCRA corrective action at Federal facilities with RCRA operating units. Specifically, the policy stated that: (1) RCRA section 3004(u) subjects Federal facilities to corrective action requirements to the same extent as privately owned or operated facilities and (2) the definition of a Federal facility boundary is equivalent to the property-wide definition of facility at privately owned or operated facilities.

The Agency has determined that the vast majority of Federal facility sites

that could be placed on the NPL have RCRA regulated units within the Federal facility property boundary. Therefore, strict application of the March 5, 1986 boundary policy and the June 10, 1986 deferred listing policy would result in placing very few Federal facility sites on the NPL. The Agency believes that this would be inconsistent with the spirit and intent of Section 120 of SARA. The Statute and its legislative history indicate that Congress intended the Agency to place Federal facility sites on the NPL and to effect cleanup at those sites. Section 120(a) provides that:

[a]ll guidelines, rules, regulations, and criteria which are applicable to \* \* \* inclusion on the National Priorities List \* \* \* shall also be applicable to facilities which are owned or operated by a department, agency, or instrumentality of the United States in the same manner and to the extent as such guidelines, rules, regulations, and criteria are applicable to other facilities.

Section 120 of SARA also contains requirements for assessing releases at Federal facilities, placing them on the NPL, and effecting remedial actions at those sites that qualify for the NPL. In the floor debates, Senator Robert T. Stafford explained section 120 as follows:

Second, the amendments require a comprehensive nationwide effort to identify and assess all Federal hazardous waste sites that warrant attention \* \* \*. The legislation \* \* \* requires that any Federal facility that meets the criteria applied to private sites listed on the national priorities list [NPL] must be placed on the NPL. Cong. Rec. S. 14902 (daily ed., Oct 3, 1986).

If the revised RCRA policy that is applicable to non-Federal sites were applied to Federal facility sites, the purposes of section 120 would be frustrated.

Given that Congress clearly contemplated that Federal facility sites would be placed on the NPL, the Agency interprets these provisions of section 120 to mean that the criteria to list Federal facility sites should not be more exclusionary than the criteria to list non-Federal sites on the NPL. Key elements of the of the current policy for listing non-Federal sites subject to RCRA corrective action requirements include whether the owner or operator has filed bankruptcy or clearly demonstrated unwillingness to comply with applicable RCRA requirements or regulations. Since bankruptcy proceedings are not applicable to Federal agencies and unwillingness to comply with Federal laws is an unlikely occurrence, application of the non-Federal facilities policy for listing RCRA sites would result in listing very few Federal sites.

Thus, in order to treat Federal and non-Federal sites equally, as required by SARA section 120, the Agency believes that the RCRA status of the site should not be considered in the decision to place a Federal facility site on the NPL.

The Agency believes that placing RCRA-related Federal sites on the NPL will also serve the purpose originally intended by section 300.66(e)(2) of the NCP—to advise the public of the status of Federal government cleanup efforts. (50 FR 47931, November 20, 1985). In addition, listing on the NPL will help other Federal agencies set priorities and focus cleanup efforts on those sites which present the most serious problems.

The policy proposed today does not restrict the use of either RCRA corrective action or enforcement authorities to achieve cleanup at Federal facilities. EPA is in the process of developing regulations for corrective action under RCRA and for cleanup of Superfund sites under the National Contingency Plan. The cleanup goals established in those regulations will be consistent with each other, within the limits of each statute, and it is EPA's expectation that remedies selected and implemented under CERCLA will generally satisfy the RCRA corrective action requirements, and vice versa.

EPA solicits comments on the appropriateness of placing on the NPL Federal facilities that may be subject to RCRA corrective action authorities. Comments should be submitted to Stephen Lingle, Director, Hazardous Site Evaluation Division (Attn. NPL Staff), Office of Emergency and Remedial Response (WH-548E) U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, not later than June 12, 1987.

Dated: May 6, 1987.

J.W. McGraw,

Acting Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 87-10910 Filed 5-12-87; 8:45 am]

BILLING CODE 6560-50-M

#### 40 CFR Part 440

[OW-FRL-3199-8]

#### Ore Mining and Dressing Point Source Category; Gold Placer Mining; Effluent Limitations Guidelines, Pretreatment Standards and New Source Performance Standards; Second Notice of New Information; Request for Comment and Extension of Comment Period

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Extension of comment period.

**SUMMARY:** On March 24, 1987 (52 FR 9414) EPA published a Notice of Availability of New Information and Request for Comment under the Clean Water Act to limit effluent discharges to waters of the United States from facilities engaged in placer gold mining operations (52 FR 9414). EPA is extending the period for comment on the proposed regulation from May 11, 1987 to June 25, 1987.

**DATE:** Comments on the Notice of Availability of New Information for the placer gold mining subcategory must be submitted to EPA by June 25, 1987.

**ADDRESSES:** Send comments to William A. Telliard, Industrial Technology Division (WH-552), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, Attention ITD Docket Clerk. Proposed Placer Gold Mining. The supporting information and all comments on this proposal are available for inspection and copying at the EPA Public Information Reference Unit in Washington, DC, Room 2404 (Rear) PM-213; at the EPA Library in Seattle; at the EPA Alaska office in Anchorage; and at the Alaska Department of Environmental Conservation office in Fairbanks, Alaska. The comments will be added to the record as they are received. The EPA Information Regulation (40 CFR Part 2) provides that a reasonable fee may be charged for copying.

**FOR FURTHER INFORMATION CONTACT:** Willis E. Umholtz (202) 382-7191.

**SUPPLEMENTARY INFORMATION:** On March 24, 1987 EPA published a Notice

of New Information which announced the availability for public review and comment of new technical and economic data and reports which EPA will utilize in promulgating final effluent limitations guidelines and standards for the placer gold mining industry (52 FR 9414). The notice stated that comments on the new information were to be submitted on or before May 8, 1987.

The Agency has received numerous requests from members of the placer gold mining industry, representatives of the State of Alaska, and others interested in this proposed regulation that additional comment time be granted to allow them to comment fully and to supply data to support their comments. Given the remote and sometimes inaccessible locations of many of those who wish to comment on the issues raised in the notice, the consequent difficulties they face in submitting comments, and the complexity of issues raised by this rulemaking, EPA has determined that it is necessary to extend the comment period 45 days to June 25, 1987. This will allow the public adequate time to review and comment on the issues raised by the notice.

Dated: May 7, 1987.

Lawrence J. Jensen,

Assistant Administrator, Office of Water.  
[FR Doc. 87-10911 Filed 5-12-87; 8:45 am]

BILLING CODE 6560-50-M

#### FEDERAL COMMUNICATIONS COMMISSION

#### 47 CFR Part 73

[MM Docket No. 87-26]

#### Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed Rule; extension of time for filing comments.

**SUMMARY:** The FCC gives notice that the Commission granted a motion for

extension of time for filing comments in response to the *Notice of Inquiry* ("NOI") in MM Docket No. 87-26 (Inquiry into § 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees) (52 FR 7626). The New York State Consumer Protection Board ("CPB") requested that the deadline for filing comments be extended from April 15, 1987, to April 30, 1987, because the summary of the NOI appeared in the *Federal Register* 30 days prior to the comment filing deadline rather than the 45 days which the Commission has been providing for notices that are not published in their

entirety in the *Federal Register*. Since the short extension of time requested will provide commenters an opportunity to present a more extensive and wide-ranging analysis of the issues set forth in the NOI, the Commission was persuaded that grant of the extension of the comment period to April 30, 1987, was warranted. However, the May 13, 1987, deadline for filing reply comments remains unchanged.

**DATE:** The comment period was extended from April 15, 1987 to April 30, 1987. Reply comments are due by May 13, 1987.

**FOR FURTHER INFORMATION CONTACT:** Eileen Huggard, Mass Media Bureau, (202) 632-7792.

**SUPPLEMENTARY INFORMATION:** The full text of this Commission decision is available for inspection copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Federal Communications Commission.

James C. McKinney,

Chief, Mass Media Bureau.

[FR Doc. 87-10515 Filed 5-12-87; 8:45 am]

BILLING CODE 6712-01-M

# Notices

Federal Register

Vol. 52, No. 92

Wednesday, May 13, 1987

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Committee on Governmental Process; Public Meeting

Pursuant to the Federal Advisory Committee Act (Pub. L. 92-463), notice is hereby given of a meeting of the Committee on Governmental Process of the Administrative Conference of the United States, to be held at 10:00 a.m. on Tuesday, May 19, 1987, at the office of Covington and Burling, 1201 Pennsylvania Avenue, NW, 11th floor, Washington, DC.

The Committee will meet for further consideration of possible recommendations on federal agency use of private attorneys. This subject is currently under study for the Administrative Conference by Professor William V. Luneburg of the University of Pittsburgh School of Law and by Professor Ronald Rotunda of the University of Illinois College of Law. A draft recommendation was published for public comment on April 23, 1987. (See 54 FR 13448).

For further information concerning this meeting, contact David Pritzker, Office of the Chairman, Administrative Conference of the United States, 2120 L Street, NW, Suite 500, Washington, DC. (Telephone 202-254-7065.)

Attendance is open to the interested public, but limited to the space available. Persons wishing to attend should notify Mr. Pritzker at least one day in advance. The committee chairman, if he deems it appropriate, may permit members of the public to present oral statements at the meeting. Any member of the public may file a written statement with the committee before, during, or after the meeting.

Minutes of the meeting will be available on request.

Jeffrey S. Lubbers,

Research Director.

May 11, 1987.

[FR Doc. 87-11066 Filed 5-12-87; 8:45 am]

BILLING CODE 6110-01-M

## DEPARTMENT OF AGRICULTURE

### Forms Under Review by Office of Management and Budget

May 8, 1987.

The Department of Agriculture has submitted to OMB for review the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35) since the last list was published. This list is grouped into new proposals, revisions, extensions, or reinstatements. Each entry contains the following information:

(1) Agency proposing the information collection; (2) Title of the information collection; (3) Form number(s), if applicable; (4) How often the information is requested; (5) Who will be required or asked to report; (6) An estimate of the number of responses; (7) An estimate of the total number of hours needed to provide the information; (8) An indication of whether section 3504(h) of Pub. L. 96-511 applies; (9) Name and telephone number of the agency contact person.

Questions about the items in the listing should be directed to the agency person named at the end of each entry. Copies of the proposed forms and supporting documents may be obtained from: Department Clearance Office, USDA, OIRM, Room 404-W Admin. Bldg., Washington, DC 20250, (202) 447-2118.

Comments on any of the items listed should be submitted directly to: Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attn: Desk Officer for USDA.

If you anticipate commenting on a submission but find that preparation time will prevent you from doing so promptly, you should advise the OMB Desk Officer of your intent as early as possible.

### Extension

- Animal and Plant Health Inspection Service

Viruses-Serums-Toxins Regulations  
VS 14-1, 14-3, 14-5, 14-7, 14-8, 14-15,  
and 14-20

Recordkeeping, On occasion

Individuals or households; Businesses or other for-profit; Non-profit institutions; 17,149 responses; 40,303 hours; not applicable under 3504(h)  
David A. Espeseth, (301) 436-6332

- Rural Electrification Administration  
Prospective Large Power Service  
REA 170

On occasion

Small businesses or organizations; 75 responses; 300 hours; not applicable under 3504(h)

David J. Lessels, (202) 382-0094

- Rural Electrification Administration  
Financial Requirement Statement  
REA 481

On occasion

Small businesses or organizations; 1,500 responses; 3,000 hours; not applicable under 3504(h)

F. Lamont Heppe, Jr., (202) 382-8530.

### New

- Forest Service  
Southeast Alaska Regional Resource  
Utilization Study

One Time Survey

Individuals or households; 1,308 responses; 981 hours; not applicable under 3504(h)

Dr. Robert M. Muth, (907) 586-8884.

### Revision

- Farmers Home Administration  
7 CFR Part 1980-Subpart G, Nonprofit  
National Corporations Loan and  
Grant Program

FmHA 1980-60, 1980-61, and 1980-63

Recordkeeping; On occasion; Annually  
Businesses or other for-profit; Non-profit institutions; 2,234 responses; 6,674 hours; not applicable under 3504(h)

Jack Holston, (202) 382-9736.

Jane A. Benoit,

Departmental Clearance Office.

[FR Doc. 87-10897 Filed 5-12-87; 8:45 am]

BILLING CODE 3410-01-M

**Commodity Credit Corporation****Commodity Certificates; Acceptance After Expiration Date; Upland Cotton**

**AGENCY:** Commodity Credit Corporation (CCC), Department of Agriculture (USDA).

**ACTION:** Notice.

**SUMMARY:** In accordance with the terms and conditions of the 1986 price support and production adjustment programs, a portion of the payments made by the Commodity Credit Corporation (CCC) were made in the form of commodity certificates which could be used to acquire commodities owned by CCC. In order to provide greater flexibility to producers who receive such certificates, it has been determined that: (1) CCC will accept, for cash, certain generic commodity certificates presented after the expiration date stated on the certificates which are in the possession of the first holder of such certificates and (2) the expiration dates of cotton commodity certificates issued under the 1986 upland cotton program are being extended. This action is being taken pursuant to the regulations governing Commodity Certificates, In Kind Payments and Other Forms of Payment (7 CFR Part 770). Section 770.4(d)6 provides that CCC may, at its option, discount or refuse to accept any commodity certificate presented after the expiration date stated on the certificate.

**DATE:** May 12, 1987.

**ADDRESS:** Director, Cotton, Grain and Rice Price Support Division, USDA-ASCS, Room 3630, South Building, P.O. Box 2415, Washington, DC 20013.

**FOR FURTHER INFORMATION CONTACT:** Beverly Pritts, Program Specialist, Cotton, Grain and Rice Price Support Division, USDA-ASCS, P.O. Box 2415, Washington, DC 20013 or call (202) 447-8374.

**SUPPLEMENTARY INFORMATION:** This notice has been reviewed under USDA procedures established in accordance with Executive Order 12291 and Departmental Regulation No. 1512-1 and has been designated as "non-major". It has been determined that these program provisions will not result in an annual effect on the economy of \$100 million or more.

The notice is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115 (June 24, 1983).

**Generic Commodity Certificates**

Some original holders of generic commodity certificates were unaware of the importance of using such certificates in their possession before the expiration date stated on the certificates.

Therefore, it has been determined that original holders of generic commodity certificates with expiration dates of December 31, 1986, through March 31, 1987, may present such certificates for cash.

Original holders may apply for payment by returning such certificates, by June 1, 1987, to the Agricultural Stabilization and Conservation Service (ASCS) office where such certificates were issued. A written request that payment be made for cash must be presented with the certificates. County Agricultural Stabilization and Conservation (ASC) Committees will review all requests and, upon approval, will authorize payments equal to the face value of the certificate minus a 15 percent discount and the 4.3 percent reduction required by the Balanced Budget and Emergency Deficit Control Act of 1985.

**Upland Cotton Commodity Certificates**

Currently, there is a shortage of CCC cotton inventory for acquisition by the use of commodity certificates. Therefore, in order to maintain the effectiveness of the use of commodity certificates by CCC, it has been determined that the expiration date of upland cotton commodity certificates issued under the 1986 upland cotton program should be extended until upland cotton becomes available for acquisition by use of commodity certificates in accordance with the 1987 upland cotton program.

Accordingly, notwithstanding the expiration date set forth on an upland cotton commodity certificate issued under the 1986 upland cotton program, the expiration date of all current outstanding and all new upland cotton commodity certificates issued under the 1986 upland cotton program shall be considered to be the later of February 29, 1988, or nine months from the end of the month in which the certificate is issued. Any person holding an upland cotton certificate should contact their local county ASCS office for additional information.

**Authority:** Secs. 4 and 5 of the Commodity Credit Corporation Charter Act, as amended, 62 Stat. 1070, as amended, 1072 (15 U.S.C. 714b and 714c); secs. 103A and 107E of the Agricultural Act of 1949, as amended, 99 Stat. 1047, as amended, 1448 (7 U.S.C. 1444-1 and 1445b-4).

Signed at Washington, DC, May 7, 1987.

Milton J. Hertz,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 87-10844 Filed 5-12-87; 8:45 am]

BILLING CODE 3410-05-M

**CHRISTOPHER COLUMBUS  
QUINCENTENARY JUBILEE  
COMMISSION****Meeting**

*Time and date:* 2:00 p.m., Thursday, June 11, 1987; 2:00 p.m., Friday, June 12, 1987.

*Place:* Governor's Ballroom, Hyatt on Capitol Square, 75 East State Street, Columbus, Ohio.

*Status:* Partly open, partly closed.

*Matters to be considered:*

*Portions Open to the Public:* June 11, 1987, internal management, legislative status, quincentenary planning in states and cities; June 12, 1987, discussion of Report to Congress, committee reports.

*Portions Closed to the Public:* June 12, 1987, discussion of preliminary budget proposal.

*Contact Person for More Information:* John Alexander Williams, 632-1992.

John Alexander Williams,

Director.

[FR Doc. 87-10882 Filed 5-12-87; 8:45 am]

BILLING CODE 6820-RB-M

**DEPARTMENT OF COMMERCE****Economic Development  
Administration**

[Docket No. 70480-7080]

**Duluth Steam District No. 2; Finding of  
No Significant Impact**

**AGENCY:** Economic Development Administration (EDA) Department of Commerce.

**ACTION:** Issuance of finding of no significant impact (FONSI): EDA's Duluth Steam District No. 2 Project.

**SUMMARY:** This Notice advises the public of the availability of EDA's Environmental Assessment and Finding of No Significant Impact (FONSI) for its Duluth Steam District No. 2/Lake Superior Paper Industries paper mill project. This FONSI is released as a supplement to a related Environmental Impact Statement (EIS) prepared by the Department of Housing and Urban Development (HUD).

**EFFECTIVE DATE:** May 13, 1987.

**FOR FURTHER INFORMATION AND ACCESS TO THE FONSI, CONTACT:**

David Maney, Director, Office of Environment, U.S. Department of Commerce, Economic Development Administration, 14th & Constitution Avenue NW., Washington, DC 20230, (202) 377-4208

For the EIS, Contact: Robert B. Lindholm, Minnesota Power, 30 W. Superior Street, Duluth, Minnesota 55802.

**Notice**

EDA is hereby giving Notice that on March 2, 1987, it issued a FONSI for its Duluth Steam District No. 2 Project. The Environmental Assessment and FONSI are available for public review. A copy may be obtained by contacting the Director, Office of Environment at the address listed above. EDA issued the FONSI in connection with a grant application for construction of a steamline associated with the Duluth Steam District No. 2/Lake Superior Paper Industries paper mill project, Duluth, Minnesota. EDA completed the environmental review, in conformance with the National Environmental Policy Act (NEPA.)

The General Counsel of the Office of Environmental Quality, Executive Office of the President, has determined that EDA's FONSI on this project can be treated procedurally at variance from the usual notice requirements since it is a supplement, and there are ample justifications for alternative arrangements as provided for in 40 CFR 1502.9. The approval of the alternative was made by the General Counsel for the Office of Environmental Quality, (General Counsel) by letter to EDA's Director, Office of the Environment dated March 3, 1987. In this letter, the General Counsel viewed EDA's Environmental Assessment and subsequent FONSI as supplementing an EIS prepared under HUD's NEPA procedures for a larger related HUD project. The General Counsel's letter also sets forth a summary of the usual procedure which includes *inter-alia*, circulation of the EIS and related documents to applicable agencies and the public. The General Counsel's letter to EDA's Director, Office of the Environment, March 3, 1987, stated as reasons for the variance:

- The fact that the entire project (absent EDA's portion) has been through two environmental assessment review procedures, with opportunity for public review and comment;
- The fact that the project is extremely noncontroversial, as demonstrated by the extremely unusual low number of letters (seven) received on the EIS which examined the paper mill project;
- The fact that the Environmental

Protection Agency stated, in a letter dated December 12, 1986, that their concerns regarding the Duluth Paper Mill project had been resolved:

- The fact that the 404 permit issued by the U.S. Army Corps of Engineers under the Clean Water Act directs the applicant to avoid fill of wetlands, in this case resulting in the necessity to commence site work before the ground thaws (in fact, the permit expires on April 30, 1987);
- The fact that adoption procedures, as normally implemented, would make it difficult, if not impossible, to commence construction in the most environmentally protective manner possible.

In short, we see this procedural variance in this case as promoting protection of wetlands (and thus, fulfilling the substantive goals of NEPA), for a project which is noncontroversial and which has no apparent significant adverse environmental impacts (per EPA's letter)."

Dated: May 7, 1987.

**Orson G. Swindle III,**

*Assistant Secretary for Economic Development.*

[FR Doc. 87-10950 Filed 5-12-87; 8:45 am]

**BILLING CODE 3510-24-M**

**International Trade Administration**

[A-588-607]

**Amorphous Silica Filament Fabric From Japan; Preliminary Determination of Sales at Less Than Fair Value**

**AGENCY:** International Trade Administration, Import Administration, Commerce.

**ACTION:** Notice.

**SUMMARY:** We have preliminarily determined that certain amorphous silica filament fabric from Japan is being, or is likely to be, sold in the United States at less than fair value. We have notified the U.S. International Trade Commission (ITC) of our determination, and we have directed the U.S. Customs Service to suspend liquidation of all entries of the subject merchandise. We have determined that "critical circumstances" exist in this case. Therefore, this suspension of liquidation applies to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption, on or after the date which is 90 days before publication of this notice, and to require a cash deposit or bond for each entry in an amount equal to the estimated dumping margin as described in the "Suspension of Liquidation" section of this notice.

If this investigation proceeds normally, we will make a final determination by July 20, 1987.

**EFFECTIVE DATE:** May 13, 1987.

**FOR FURTHER INFORMATION CONTACT:** Charles Wilson (202-377-5288), Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:****Preliminary Determination**

We have preliminarily determined that amorphous silica filament fabric from Japan is being, or is likely to be, sold in the United States at less than fair value as provided in section 733 of the Tariff Act of 1930, as amended (19 U.S.C. 1673b) (the Act). We made fair value comparisons on sales of the class or kind of merchandise to the United States during the period of investigation, November 1, 1985 through October 31, 1986. Comparisons were based on United States price and foreign market value, based on home market sales of the merchandise provided by the respondent. The weighted-average margin is shown in the "Suspension of Liquidation" section of this notice.

**Case History**

On October 27, 1986, we received a petition in proper form filed by Ametek, Inc. (Haveg Division), and by HITCO, on behalf of the U.S. industry producing certain silica filament fabric. In compliance with the filing requirements of § 353.36 of the Commerce Regulations (19 CFR 353.36), the petition alleged that imports of the subject merchandise from Japan are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Act and that these imports are causing material injury, or threaten material injury, to a United States industry.

After reviewing the petition, we determined that it contained sufficient grounds upon which to initiate an antidumping duty investigation. We initiated the investigation on November 17, 1986 (51 FR 42121, November 21, 1986) and notified the ITC of our action.

On December 11, 1986, the ITC determined that there is a reasonable indication that imports of amorphous silica filament fabric from Japan are materially injuring a U.S. industry (52 FR 870, January 9, 1987).

On January 22, 1987, we presented an antidumping duty questionnaire to Nippon Muki Co., Ltd., the only known exporter of the subject merchandise from Japan to the United States. We requested a response in 30 days. On March 2, 1987, we received the questionnaire response. On March 6,

1987 and on April 1, 1987, we requested additional information. We received additional information from Nippon Muki on March 16, March 18, and on April 15, 1987. On March 18, 1987, at the request of the petitioners, we extended the date of the preliminary determination to May 6, 1987 (52 FR 9324, March 24, 1987).

#### Scope of Investigation

The product covered by this investigation is certain commercial grade woven fabric, of glass (silica filaments), whether or not colored, containing not over 17 percent of wool by weight, as currently provided for in items 338.2500 and 338.2700 of the *Tariff Schedules of the United States Annotated* (TSUSA).

#### Fair Value Comparisons

To determine whether sales of the subject merchandise in the United States were made at less than fair value, we compared the United States price to the foreign market value using data provided in the response. We investigated sales of amorphous silica filament fabric sold during the period November 1, 1985 through October 31, 1986.

#### United States Price

Nippon Muki's sales were made through a related sales agent in the United States to an unrelated purchaser prior to the date of importation. As provided in section 772(b) of the Act, we based the United States price on purchase price. In reaching the conclusion that purchase price was the appropriate indicator of United States price we considered the following elements:

1. The merchandise in question was shipped directly from the manufacturer to the unrelated buyer, without being introduced into the inventory of the related selling agent;
2. This was the customary commercial channel for sales of this merchandise between the parties involved; and
3. The related selling agent located in the United States acted only as a processor of sales-related documentation and a communication link with the unrelated U.S. buyer.

Where all the above elements are met, we regard the routine selling functions of the exporter as having been merely relocated geographically from the country of exportation to the United States, where the sales agent performs them. Whether these functions are done in the United States or abroad does not change the substance of the transaction. The related sales agent merely facilitates a transaction such as occurs

in a direct shipment to an unrelated purchaser. (See *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished from Japan: Preliminary Determination of Sales at Less Than Fair Value*, 59 FR 9905, 9906, March 27, 1987)

We made deductions from the c.i.f. duty paid, delivered, packed prices for ocean freight, marine insurance, brokerage and handling, U.S. inland freight, U.S. duty and foreign inland freight.

#### Foreign Market Value

In accordance with section 773(a)(1)(A) of the Act, we based foreign market value on sales in the home market. We made adjustments, where appropriate, for differences in credit costs and for differences in the physical characteristics of the merchandise, in accordance with §§ 353.15 and 353.16 of the Commerce Regulations. Respondent claims circumstance of sale adjustments to home market prices for advertising and technical services expenses. Information submitted indicates that the amounts claimed for these expenses include expenses not directly related to the sales under investigation. Therefore, we have not allowed these adjustments in our calculations. If the appropriateness of these claims can be established at verification, we will consider these in our final determination.

Pursuant to § 353.56 of the Commerce regulations, we made currency conversions at the rates certified by the Federal Reserve Bank.

#### Critical Circumstances

In the petition, filed October 27, 1986, petitioners alleged that "critical circumstances" exist within the meaning of section 733(e) of the Act with respect to amorphous silica filament fabric from Japan. In determining whether critical circumstances exist, we must examine whether:

- (A)(i) There is a history of dumping in the United States or elsewhere of the class or kind of merchandise which is the subject of investigation; or
- (ii) The person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise which is the subject of the investigation at less than fair value; and
- (B) There have been massive imports of the class or kind of merchandise which is the subject of the investigation over a relatively short period.

A review of all available data shows no history of dumping in the United States or elsewhere.

In determining whether the importer knew, or should have known, that the exporter was selling the merchandise at less than fair value, we find that the level of margins calculated indicate imputed knowledge on the part of the importer.

To determine whether imports have been massive over a relatively short period, we analyzed recent Department of Commerce IM-146 trade statistics on imports of this merchandise for equal periods immediately preceding and following the filing of the petition, from July through December 1986. Although these statistics include merchandise other than that under investigation, they are the only relevant publicly available statistics. These statistics showed a significant increase in imports in the post-filing period over the pre-filing period. Further, information submitted to the International Trade Commission, which is limited to the product under investigation, indicates significant increases in market penetration in 1986 compared to 1985. Since imports of the merchandise did not begin until 1983, we have not included the start up years of 1983 and 1984 in our import pattern analysis.

For the above reasons, we preliminarily conclude that critical circumstances do exist with respect to amorphous silica filament fabric from Japan.

#### Verification

As provided in section 776(a) of the Act, we will verify all information used in reaching the final determination in this investigation.

#### Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the United States Customs Service to suspend liquidation of all entries of amorphous silica filament fabric from Japan that are entered, or withdrawn from warehouse, for consumption, on or after the date which is 90 days before the date of publication of this notice in the *Federal Register*.

The U.S. Customs Service shall require a cash deposit or the posting of a bond equal to the estimated weighted-average amount by which the foreign market value of the merchandise subject to this investigation exceeded the United States price, which was 193.94%. The suspension of liquidation will remain in effect until further notice.

#### ITC Notification

In accordance with section 733(f) of the Act, we will notify the ITC of our determination. In addition, we are

making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Deputy Assistant Secretary for Import Administration.

The ITC will determine whether these imports materially injure, or are threatening material injury to, a U.S. industry before the later of 120 days after the date of our preliminary affirmative determination or 45 days after we make our final affirmative determination.

#### Public Comment

In accordance with § 353.47 of our regulations (19 CFR 353.47), if requested, we will hold a public hearing to afford interested parties an opportunity to comment on this preliminary determination at 1:30 p.m. on June 5, 1987, at the U.S. Department of Commerce, Room 3708, 14th and Constitution Avenue, NW., Washington, DC 20230. Individuals who wish to participate in the hearing must submit a request to the Deputy Assistant Secretary for Import Administration, Room B-099, at the above address within 10 days of the publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; (3) the reason for attending; and (4) a list of the issues to be discussed.

In addition, prehearing briefs in at least 10 copies must be submitted to the Deputy Assistant Secretary by May 29, 1987. Oral presentations will be limited to issues raised in the briefs. All written views should be filed in accordance with 19 CFR 353.46, not less than 30 days before the final determination, or, if a hearing is held, within 7 days after the hearing transcript is available, at the above address in at least 10 copies.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f)).

Gilbert B. Kaplan,  
Deputy Assistant Secretary for Import  
Administration,  
May 6, 1987.

[FR Doc. 87-10836 Filed 5-12-87; 8:45 am]  
BILLING CODE 3510-DS-M

[A-588-606]

#### Preliminary Determination of Sales at Not Less Than Fair Value: Certain Forged Steel Crankshafts From Japan

**AGENCY:** International Trade Administration, Import Administration, Department of Commerce.

**ACTION:** Notice.

**SUMMARY:** We preliminarily determine that certain forged steel crankshafts (CFSC) from Japan are not being, nor are likely to be, sold in the United States at less than fair value. We have notified the U.S. International Trade Commission (ITC) of our determination. If this investigation proceeds normally, we will make a final determination by July 21, 1987.

**EFFECTIVE DATE:** May 13, 1987.

#### FOR FURTHER INFORMATION CONTACT:

Rick Herring, Ellie Shea, or Tom Bombelles, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 377-0187, 377-0184, or 377-3174.

#### SUPPLEMENTARY INFORMATION:

##### Preliminary Determination

We preliminarily determine that imports of CFSC from Japan are not being, nor are likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930, as amended (19 U.S.C. 1673b) (the Act). We have found that the weighted-average margin for the company being investigated is *de minimis*.

##### Case History

On October 9, 1986, we received a petition filed in proper form by Wyman-Gordon Company. In compliance with the filing requirements of § 353.36 of the Commerce Regulations (19 CFR 353.36), the petition alleged that imports of CFSC from Japan are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Act, and that these imports are materially injuring, or threaten material injury to, a U.S. industry.

After reviewing the petition, we determined that it contained sufficient grounds upon which to initiate an antidumping duty investigation. We initiated such an investigation on October 29, 1986 (51 FR 40347, November 6, 1986), and notified the ITC of our action.

On November 18, 1986, the ITC determined that there is a reasonable indication that imports of CFSC from

Japan are materially injuring a U.S. industry (51 FR 44537, December 10, 1986).

On January 6, 1987, an antidumping duty questionnaire was presented to Sumitomo Metal Industries, Ltd. (SMI), which accounts for at least 65 percent of the exports of CFSC from Japan to the United States during the period of investigation, May 1, 1985 through October 31, 1986. On January 30, 1987, we granted a request for an extension in which to submit the questionnaire response until February 17, 1987. On February 17 and 26, 1987, we received questionnaire responses from SMI. A deficiency questionnaire was sent to SMI on March 6, 1987, and a supplemental questionnaire was sent on April 13, 1987. Responses to these questionnaires, as well as other supplemental information, have been submitted by SMI prior to this determination.

On February 20, 1987, petitioner filed a request for extension of the deadline date for the preliminary determination pursuant to section 733(c)(1)(A) of the Act. On February 26, 1987, we extended the deadline date for the preliminary determination by 50 days, to not later than May 7, 1987 (52 FR 7286, March 10, 1987).

##### Scope of Investigation

The products covered by this investigation are forged carbon or alloy steel crankshafts with a shipping weight between 40 and 750 pounds, whether machined or unmachined. These products are currently classified under items 660.6713, 660.6727, 660.6747, 660.7113, 660.7127 and 660.7147 of the *Tariff Schedules of the United States Annotated* (TSUSA). Neither cast crankshafts nor forged crankshafts with shipping weights of less than 40 pounds or greater than 750 pounds are subject to this investigation.

##### Period of Investigation

CFSC are normally sold to the United States on the basis of long-term requirements contracts. Therefore, in order to capture the most recent sales of CFSC to the United States, we extended the period of investigation to encompass the 18 months from May 1, 1985 to October 31, 1986, instead of using the six-month period defined by § 353.38(a) of our regulations.

##### Fair Value Comparisons

To determine whether sales of CFSC in the United States were made at less than fair value, we compared the United States price to the foreign market value

for SMI, using data provided in the responses.

We made comparisons on all sales of CFSC during the period of investigation, May 1, 1985 through October 31, 1986. We divided the 18-month review period into three six-month periods for purposes of making price-to-price comparisons.

#### United States Price

As provided in section 772(b) of the Act, we used the purchase price of CFSC to represent the United States price for sales by SMI, because the merchandise was sold to unrelated purchasers prior to its importation into the United States. In response to our questionnaire, the respondent has stated that the first sale of CFSC destined for the United States to an unrelated party is between SMI and Sumitomo Corporation. The respondent has also stated that SMI and Sumitomo Corporation are not related within the meaning of section 771(13) of the Act.

In accordance with our longstanding position, we have accepted this response for purposes of our preliminary determination. However, we have sought additional information from respondent and will obtain information during verification on the issue of whether SMI and Sumitomo Corporation are related within the meaning of the antidumping law.

We calculated the purchase price based on the packed FOB (free on board), CFS (container freight station), CY (container yard), or FAS (free alongside ship) price to unrelated purchasers. All U.S. sales, as well as all such or similar home market sales, were made to Sumitomo Corporation, a Japanese trading company.

From the price charged between Sumitomo Corporation and SMI, we made deductions for inland freight and, where appropriate, other delivery charges. In the response, SMI deducted after-sale warehousing expenses from the gross price that it received from Sumitomo Corporation. We consider this to be a circumstance of sale adjustment. Therefore, we have added this charge back into the gross price and made the appropriate adjustment to the foreign market value.

#### Foreign Market Value

In accordance with section 773(a)(1)(A) of the Act, we based foreign market value for CFSC on sales in the home market. When comparing foreign market value to purchase price sales, we made deductions, where appropriate, from the home market price for inland freight. We added U.S. packing costs. We made adjustments under § 353.15 of

the Commerce Regulations for differences in circumstances of sale for credit expenses, after-sale warehousing, and sales commissions in the United States and home markets. Pursuant to § 353.16 of our regulations, we made adjustments, where appropriate, to account for differences in physical characteristics of the merchandise.

#### Currency Conversion

When calculating foreign market value, we made currency conversions from Japanese yen to U.S. dollars in accordance with § 353.56(a) of our regulations, using the certified daily exchange rates furnished by the Federal Reserve Bank of New York.

#### Verification

We will verify all information used in making our final determination in accordance with section 776(a) of the Act. We will follow standard verification procedures, including examination of relevant sales and financial records of the company under investigation.

#### Preliminary Results

The preliminary results of our investigation are as follows:

Manufacturer/producer/exporter	Weighted-average margin percentage
Sumitomo Metal Industries, Ltd.	.05

#### ITC Notification

In accordance with section 733(f) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Deputy Assistant Secretary for Import Administration.

If our final determination is affirmative, the ITC will determine whether these imports are materially injuring, or threaten material injury to, a U.S. industry within 75 days after our final determination.

#### Public Comment

In accordance with § 353.47 of our regulations (19 CFR 353.47), if requested, we will hold a public hearing to afford interested parties an opportunity to comment on this preliminary

determination at 1:00 p.m. on June 23, 1987, at the U.S. Department of Commerce, Room 1414, 14th and Constitution Avenue NW., Washington, DC 20230. Individuals who wish to participate in the hearing must submit a request to the Deputy Assistant Secretary for Import Administration, Room B-099, at the above address within ten days of the publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; (3) the reason for attending; and (4) a list of the issues to be discussed.

In addition, prehearing briefs in at least ten copies must be submitted to the Deputy Assistant Secretary by June 16, 1987. Oral presentations will be limited to issues raised in the briefs. All written views should be filed in accordance with 19 CFR 353.46, not less than 30 days before the final determination, or, if a hearing is held, within seven days after the hearing transcript is available, at the above address in at least ten copies.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f)).

Gilbert B. Kaplan,  
Deputy Assistant Secretary for Import Administration.

May 7, 1987.

[FR Doc. 87-10951 Filed 5-12-87; 8:45 am]

BILLING CODE 3510-DS-M

#### [A-412-602]

#### Preliminary Determination of Sales at Less Than Fair Value: Certain Forged Steel Crankshafts From the United Kingdom

**AGENCY:** International Trade Administration, Import Administration, Commerce.

**ACTION:** Notice.

**SUMMARY:** We preliminarily determine that certain forged steel crankshafts (CFSC) from the United Kingdom are being, or are likely to be, sold in the United States at less than fair value. We have notified the U.S. International Trade Commission (ITC) of our determination and have directed the U.S. Customs Service to suspend liquidation of all entries of CFSC from the United Kingdom that are entered or withdrawn from warehouse, for consumption, on or after the date of publication of this notice, and to require a cash deposit or bond for each entry in an amount equal to the estimated weighted-average dumping margin as described in the "Suspension of

Liquidation" section of this notice. If this investigation proceeds normally, we will make a final determination by July 21, 1987.

**EFFECTIVE DATE:** May 13, 1987.

**FOR FURTHER INFORMATION:** Contact Loc Nguyen, Lori Cooper, or Gary Taverman, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 377-0167, 377 8320, or 377-0161.

**SUPPLEMENTARY INFORMATION:**

**Preliminary Determination**

We preliminarily determine that imports of CFSC from the United Kingdom are being, or are likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930, as amended (19 U.S.C. 1673b) (the Act). The estimated weighted-average dumping margin is shown in the "Suspension of Liquidation" section of this notice.

**Case History**

On October 9, 1986, we received a petition filed in proper form by Wyman-Gordon Company. In compliance with the filing requirements of § 353.36 of the Commerce Regulations (19 CFR 353.36), the petition alleged that imports of CFSC from the United Kingdom are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Act, and that these imports are materially injuring, or threaten material injury to, a U.S. industry.

After reviewing the petition, we determined that it contained sufficient grounds upon which to initiate an antidumping duty investigation. We initiated such an investigation on October 29, 1986 (51 FR 40348, November 6, 1986), and notified the ITC of our action.

On November 18, 1986, the ITC determined that there is a reasonable indication that imports of CFSC from the United Kingdom are materially injuring a U.S. industry (51 FR 44537, December 10, 1986).

On December 12, 1986, an antidumping duty questionnaire was presented to United Engineering & Forging (UEF). UEF accounted for all exports of CFSC from the United Kingdom to the United States during the period of investigation, October 1, 1985, through October 31, 1986. On January 15, 1987, we granted a request for an extension of the time in which to submit the questionnaire response until January 30, 1987. On February 4, 1987, we

received the questionnaire response of UEF. A deficiency questionnaire was sent to UEF on March 5, 1987. A response to that questionnaire, as well as other supplemental information, has been submitted by UEF prior to this determination.

On February 20, 1987, petitioner filed a request for extension of the deadline date for the preliminary determination pursuant to section 733(c)(1)(A) of the Act. On February 26, 1987, we extended the deadline date for the preliminary determination by 50 days, to not later than May 7, 1987 (52 FR 7286, March 10, 1987).

**Scope of Investigation**

The products covered by this investigation are forged carbon or alloy steel crankshafts with a shipping weight between 40 and 750 pounds, whether machined or unmachined. These products are currently classified under items 660.6713, 660.6727, 660.6747, 660.7113, 660.7127 and 660.7147 of the *Tariff Schedules of the United States Annotated* (TSUSA). Neither cast crankshafts nor forged crankshafts with shipping weights of less than 40 pounds or greater than 750 pounds are subject to this investigation.

**Period of Investigation**

CFSC are normally sold to U.S. customers on the basis of long-term requirements contracts. Therefore, in order to capture the most recent sales of CFSC to U.S. customers, we extended the period of investigation to encompass the 13 months from October 1, 1985 to October 31, 1986, instead of using the six-month period defined by § 353.38(a) of our regulations.

**Fair Value Comparisons**

To determine whether sales of CFSC in the United States were made at less than fair value, we compared the United States price to the foreign market value for the company under investigation, using data provided in the response.

**United States Price**

As provided in section 772(b) of the Act, we used the purchase price of CFSC to represent the United States price for sales by UEF, because the merchandise was sold to unrelated purchasers prior to its importation into the United States.

We calculated the purchase price based on c.i.f., delivered prices to unrelated purchasers. We made deductions for foreign inland freight, ocean freight, marine insurance, U.S.

inland freight, brokerage and handling, and U.S. customs duties.

**Foreign Market Value**

In accordance with section 773(a)(1)(A) of the Act, we based foreign market value for CFSC on delivered prices in the home market. We made deductions for foreign inland freight and added packing costs in the U.S. market. We made circumstance of sale adjustments for credit expenses, warranty expenses, and after-sale warehousing expenses, in accordance with § 353.15(a) of our regulations. Pursuant to § 353.16 of our regulations, we made adjustments, where appropriate, to account for differences in the physical characteristics of the merchandise.

UEF reported what it deemed to be technical services expenses; however, we made no adjustment for these expenses, because we do not consider them to be directly related expenses within the meaning of section 353.15 of our regulations. We will look further into this issue during verification.

**Currency Conversion**

When calculating foreign market value, we made currency conversions from British pounds sterling to U.S. dollars in accordance with § 353.56(a) of our regulations, using the certified daily exchange rates furnished by the Federal Reserve Bank of New York.

**Verification**

We will verify information used in making our final determination in accordance with section 776(a) of the Act. We will use standard verification procedures, including examination of relevant sales and financial records of the company under investigation.

**Suspension of Liquidation**

In accordance with section 733(d) of the Act, we are directing the U.S. Customs Service to suspend liquidation of all entries of CFSC from the United Kingdom that are entered or withdrawn from warehouse, for consumption, on or after the date of publication of this notice in the *Federal Register*. The U.S. Customs Service shall require a cash deposit or the posting of a bond equal to the estimated weighted-average amount by which the foreign market value of CFSC from the United Kingdom exceeds the United States price, as shown in the table below. This suspension of liquidation will remain in effect until further notice.

Manufacturer/producer/exporter	Estimated weighted-average margin percentage
United Engineering & Forging.....	24.53
All others.....	24.53

### ITC Notification

In accordance with section 733(f) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Deputy Assistant Secretary for Import Administration.

If our final determination is affirmative, then the ITC will determine no later than 120 days after the date of this preliminary determination, or 45 days after our final determination, whether these imports are materially injuring, or threaten material injury to, a U.S. industry.

### Public Comment

In accordance with § 353.47 of our regulations (19 CFR 353.47), if requested, we will hold a public hearing to afford interested parties an opportunity to comment on this preliminary determination at 10:00 a.m. on June 23, 1987, at the U.S. Department of Commerce, Room 1413, 14th and Constitution Avenue NW., Washington, DC 20230. Individuals who wish to participate in the hearing must submit a request to the Deputy Assistant Secretary for Import Administration, Room B-099, at the above address within ten days of the publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; (3) the reason for attending; and (4) a list of the issues to be discussed.

In addition, prehearing briefs in at least ten copies must be submitted to the Deputy Assistant Secretary by June 16, 1987. Oral presentations will be limited to issues raised in the briefs. All written views should be filed in accordance with 19 CFR 353.46, not less than 30 days before the final determination, or, if a hearing is held, within seven days after the hearing transcript is available, at the above address in at least ten copies.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f)).

Gilbert B. Kaplan,  
Deputy Assistant Secretary for  
Administration.

May 7, 1987.

[FR Doc. 87-10952 Filed 5-12-87; 8:45 am]

BILLING CODE 3510-DS-M

[A-428-604]

### Preliminary Determination of Sales at Less Than Fair Value: Certain Forged Steel Crankshafts From the Federal Republic of Germany

**AGENCY:** International Trade Administration, Import Administration, Commerce.

**ACTION:** Notice.

**SUMMARY:** We preliminarily determine that certain forged steel crankshafts (CFSC) from the Federal Republic of Germany (FRG) are being, or are likely to be, sold in the United States at less than fair value. We have notified the U.S. International Trade Commission (ITC) of our determination and have directed the U.S. Customs Service to suspend liquidation of all entries of CFSC, except for entries from Gerlach-Werke GmbH, that are entered or withdrawn from warehouse, for consumption, on or after the date of publication of this notice, and to require a cash deposit or bond for each entry in an amount equal to the estimated weighted-average dumping margins as described in the "Suspension of Liquidation" section of this notice. If this investigation proceeds normally, we will make a final determination by July 21, 1987.

**EFFECTIVE DATE:** May 13, 1987.

**FOR FURTHER INFORMATION CONTACT:** Steve Morrison, Roy Van Buskirk or Gary Taverman, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 377-0189, 377-0631, or 377-0161.

### SUPPLEMENTARY INFORMATION:

#### Preliminary Determination

We preliminarily determine that imports of CFSC from the FRG are being, or are likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930, as amended (19 U.S.C. 1673b) (the Act). The estimated weighted-average dumping margins are shown in the "Suspension of Liquidation" section of this notice.

### Case History

On October 9, 1986, we received a petition filed in proper form by Wyman-Gordon Company. In compliance with the filing requirements of § 353.36 of the Commerce Regulations (19 CFR 353.36), the petition alleged that imports of CFSC from the FRG are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Tariff Act of 1930, as amended (the Act), and that these imports are materially injuring, or threaten material injury to, a U.S. industry.

After reviewing the petition, we determined that it contained sufficient grounds upon which to initiate an antidumping duty investigation. We initiated the investigation on October 29, 1986 (51 FR 40349, November 6, 1986), and notified the ITC of our action.

On November 18, 1986, the ITC determined that there is a reasonable indication that imports of CFSC from the FRG are materially injuring a U.S. industry (51 FR 44537 December 10, 1986).

On December 16, 1986, antidumping duty questionnaires were presented to Gerlach-Werke GmbH (Gerlach) and Thyssen Umformtechnik (Tyssen), the two FRG producers that account for virtually all of the exports to the United States during the period of investigation. We received the questionnaire responses from Thyssen on February 5 and from Gerlach on February 6, 1987. Deficiency questionnaires were sent to Thyssen and Gerlach on February 6, 1987. In addition, we sent constructed value questionnaires to Gerlach and Thyssen on March 18 and April 14, 1987, respectively. Responses to our questionnaires as well as additional supplemental information, were submitted prior to this determination.

On February 20, 1987, petitioner filed a request for extension of the deadline date for the preliminary determination pursuant to section 773(c)(1)(A) of the Act. On February 26, 1987, we extended the deadline date for the preliminary determination by 50 days, to not later than May 7, 1987 (52 FR 7286, March 10, 1987).

### Scope of Investigation

The products covered by this investigation are forged carbon or alloy steel crankshafts with a shipping weight between 40 and 750 pounds, whether machined or unmachined. These products are currently classified under items 660.6713, 660.6727, 660.6747, 660.7113, 660.7127 and 660.7147 of the *Tariff Schedules of the United States Annotated* (TSUSA). Neither cast

crankshafts nor forged crankshafts with shipping weights of less than 40 pounds or greater than 750 pounds are subject of this investigation.

#### Period of Investigation

CFSC are normally sold to the United States on the basis of long-term requirements contracts. Therefore, in order to capture the most recent sales of CFSC to the United States, we extended the period of investigation to encompass the 20 months from March 1, 1985, to October 31, 1986, instead of using the six-month period defined by § 353.38(a) of our regulations.

#### Date of Sale Issue

Over the course of this investigation, comments were submitted by both petitioner and counsel for Thyssen stating their positions on what each considers to constitute the appropriate date of Thyssen's U.S. sales. Petitioner contends that certain sales reported by Thyssen were actually made before the period of investigation and that certain other sales took place during the period of investigation, but were not reported. Thyssen contends that it has properly reported all U.S. sales that were confirmed during the period of investigation.

In considering this issue we have reviewed documents filed by both parties. Counsel for Thyssen has submitted various documents including requests for quotation, memoranda between companies concerning negotiations, offers, acceptances, revisions and purchase orders. Likewise, counsel for petitioner has submitted documentation also purporting to support its allegation. We examined all documents received for evidence of written confirmation of sales quantity and price. Based on our review, we have excluded Thyssen's 1985 shipments from our calculations because we believe the price and quantity were confirmed prior to the period of investigation. We included certain shipments made subsequent to the period of investigation because documentation submitted by Thyssen indicates that that sale on which the shipments were based actually occurred during the period of investigation. We will carefully examine this issue at verification.

#### Fair Value Comparisons

To determine whether sales of CFSC in the United States were made at less than fair value, we compared the United States price to the foreign market value for the companies under investigation, using data provided in the responses.

#### United States Price

As provided in section 772(b) of the Act, we used the purchase price of CFSC to represent the United States price for sales by Gerlach and Thyssen because the merchandise was sold directly to unrelated purchasers prior to its importation into the United States.

For sales which were made through a related sales agent in the United States to an unrelated purchaser prior to the date of importation, we used purchase price as the basis for determining United States price. For these sales, the department determined that purchase price was the more appropriate indicator of the United States price based on the following elements:

1. The merchandise in question was shipped directly from the manufacturer to the unrelated buyer, without being introduced into the inventory of the related selling agent;
2. This was the customary commercial channel for sales of this merchandise between the parties involved; and
3. The related selling agent located in the United States acted only as a processor of sales-related documentation and a communication link with the unrelated U.S. buyer.

Where all the above elements are met, we regard the routine selling functions of the exporter as having been merely relocated geographically from the country of exportation to the United States, where the agent performs them. Whether these functions are done in the United States or abroad does not change the substance of the transactions or the functions themselves.

We calculated the purchase price based on the c.i.f. delivered, duty paid price to unrelated purchasers. We made deductions, where appropriate, for foreign inland freight, ocean freight, U.S. inland freight, inland and marine insurance, U.S. customs duty and brokerage and handling.

Thyssen requested that we increase the purchase price to account for tooling cost which were paid by its U.S. customer separately from the crankshaft invoice price. We have disallowed this claim because such expenses do not qualify as an addition to purchase price pursuant to section 772(d)(1) of the Act. We have requested information on tooling costs associated with home market sales and will consider making a circumstance of sale adjustment if the information is provided on a timely basis and verified.

#### Foreign Market Value

In accordance with section 773(a)(1)(A) of the Act, we calculated foreign market value based on home

market sales and, where appropriate, constructed value. For both Gerlach and Thyssen, a constructed value comparison was used for all but one sale in the United States during the period of investigation.

For Gerlach, we based our calculations of foreign market value on the ex-works, packed prices to unrelated purchasers in the home market. Pursuant to § 353.15 of our regulations, we made circumstance of sale adjustments for differences in warranty expenses and credit expenses. We allowed an offset for indirect selling expenses in the home market up to the amount of the commissions for certain shipments in the U.S. market in accordance with § 353.15(c) of the Commerce Regulations. We made an adjustment to account for differences in physical characteristics of the merchandise in accordance with § 353.16 of our regulations. We deducted home market packing and added U.S. packing expenses. We have disallowed an offset of indirect selling expenses for 1986 shipments by Gerlach because its information indicates that the commission may have been paid to a U.S. selling agent who is related to Gerlach through ownership by a common holding company. We will carefully examine this issue during verification.

For Thyssen, we based our calculations on delivered, packed prices to unrelated purchasers in the home market. We deducted home market inland freight and made a circumstance of sale adjustment for credit expenses. We made an adjustment to account for differences in physical characteristics of the merchandise in accordance with § 353.16 of our regulations. We deducted home market packing and added U.S. packing expenses.

#### Constructed Value

We used constructed value as the basis for calculating foreign market value where there were no sales of such or similar merchandise as defined in section 771(16) of the Act. The constructed values were based on the respondents' information, using actual material and fabrication costs. We made the following adjustments to the data submitted by the respondents:

##### 1. Gerlach

a. Material cost was adjusted upward by subtracting the claim for special rebates and other credits.

b. Labor cost was adjusted to compensate for a reported increase in input units during the fabrication process.

c. Factory overhead was adjusted to compensate for a reported increase in input units during the fabrication process.

d. Machining costs used were those reported in the original response as machining adjustments.

e. SG&A, as reported, exceeded the statutory minimum of ten percent; therefore actual costs were used.

f. Profit, as reported, did not meet the statutory minimum; therefore eight percent was used.

We made a circumstance of sale adjustment to the constructed value to account for warranty expenses.

## 2. Thyssen

a. SG&A, as reported, exceeded the statutory minimum of ten percent; therefore actual costs were used.

b. Profit, as reported, exceeded the statutory minimum; therefore actual profit was used.

## Currency Conversion

When calculating foreign market value, we made currency conversions from French francs and German marks to U.S. dollars in accordance with § 353.56(a) of our regulations, using the certified daily exchange rates furnished by the Federal Reserve Bank of New York.

## Verification

We will verify all information used in making our final determination in accordance with section 776(a) of the Act. We will follow standard verification procedures, including examination of relevant sales and financial records of the companies under investigation.

## Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the U.S. Customs Service to suspend liquidation of all entries of CFSC, from the FRG, except Gerlach-Werke GmbH that are entered, or withdrawn from warehouse, for consumption, on or after the date of publication of this notice in the **Federal Register**. The U.S. Customs Service shall require a cash deposit or the posting of a bond equal to the estimated weighted-average dumping amount by which the foreign market value of CFSC from the FRG, except from Gerlach-Werke GmbH, exceeds the United States price, as shown in the table below. This suspension of liquidation will remain in effect until further notice.

Manufacturer/producer/exporter	Estimated weighted-average margin percentage
Gerlach-Werke GmbH.....	De minimis.
Thyssen Umformtechnik.....	1.69.
All others.....	.78.

## ITC Notification

In accordance with section 733(f) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Deputy Assistant Secretary for Import Administration.

The ITC will determine whether these imports are materially injuring, or threaten material injury to, a U.S. industry no later than 120 days after the date of this preliminary determination or 45 days after our final affirmative determination.

## Public Comment

In accordance with section 353.47 of our regulations (19 CFR 353.47), if requested, we will hold a public hearing to afford interested parties an opportunity to comment on this preliminary determination on June 25, 1987, at 1 p.m., at the U.S. Department of Commerce, Room B841, 14th and Constitution Avenue, NW., Washington, DC 20230. Individuals who wish to participate in the hearing must submit a request to the Deputy Assistant Secretary for Import Administration, Room B-099, at the above address within ten days of the publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; (3) the reason for attending; and (4) a list of the issues to be discussed.

In addition, prehearing briefs in at least ten copies must be submitted to the Deputy Assistant Secretary by June 18, 1987. Oral presentations will be limited to issues raised in the briefs. All written views should be filed in accordance with 19 CFR 353.46, not less than 30 days before the final determination, or, if a hearing is held, within seven days after the hearing transcript is available, at the above address in at least ten copies.

This determination is published

pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f)).

May 7, 1987.

Gilbert B. Kaplan,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 87-10953 Filed 5-42-87; 8:45am]

BILLING CODE 3510-DS-M

## [A-588-028]

## Roller Chain, Other Than Bicycle, From Japan; Final Results of Antidumping Duty Administrative Review

**AGENCY:** International Trade Administration/Import Administration, Department of Commerce.

**ACTION:** Notice of final results of antidumping duty administrative review.

**SUMMARY:** On December 5, 1986 the Department of Commerce published the preliminary results of its administrative review of the antidumping finding on roller chain, other than bicycle, from Japan. The review covers 18 manufacturers and/or exporters of this merchandise to the United States and generally the period April 1, 1981 through March 31, 1983. The review indicates the existence of margins for some of the firms during the period.

We gave interested parties an opportunity to comment on the preliminary results. Based on our analysis of the comments received, we have changed the final results from those presented in our preliminary results of review for Nissan Motor Co., Ltd. and we also intend to publish separately a tentative determination to revoke in part for several firms.

**EFFECTIVE DATE:** May 13, 1987.

**FOR FURTHER INFORMATION CONTACT:** Richard P. Bruno or Robert J. Marenick, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-5255.

## SUPPLEMENTARY INFORMATION:

### Background

On December 5, 1986, the Department of Commerce ("the Department") published in the **Federal Register** (51 FR 48943) the preliminary results of its administrative review of the antidumping finding on roller chain, other than bicycle, from Japan (38 FR 9926, April 12, 1973). The Department has now completed the administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

**Scope of the Review**

Imports covered by the review are shipments of roller chain, other than bicycle, from Japan. The term "roller chain, other than bicycle" as used in this review includes chain, with or without attachments, whether or not plated or coated, and whether or not manufactured to American or British standards, which is used for power transmission and/or conveyance. Such chain consists of a series of alternately assembled roller links and pinlinks in which the pins articulate inside the bushings and the rollers are free to turn on the bushings. Pins and bushings are press fit in their respective link plates. Chain may be single strand, having one row of roller links, or multiple strand, having more than one row of roller links. The center plates are located between the strands of roller links. Such chain may be either single or double pitch and may be used as power transmission or conveyor chain. This review also covers leaf chain, which consists of a series of link plates alternately assembled with pins in such a way that the joint is free to articulate between adjoining pitches. This review further covers chain model numbers 25 and 35. Roller chain, other than bicycle, is currently classifiable under various provisions of the Tariff Schedules of the United States Annotated, from item numbers 652.1400 through 652.3800.

The review covers eighteen manufacturers and/or exporters of Japanese roller chain, other than bicycle, to the United States, and generally the period April 1, 1981 through March 31, 1983.

**Analysis of Comments Received**

We invited interested parties to comment on the preliminary results. We received a comment from a respondent concerning a currency conversion error. We have corrected this error. We received one additional comment from three related respondents, Daido Kogyo Co., Ltd. (Daido Kogyo), Enuma Chain Manufacturing Co., Ltd. (Enuma), and Meisei Trading Co., Ltd., now called Daido Corporation (Meisei).

*Comment:* Daido Kogyo, Enuma, and Meisei argue that a tentative revocation for each company should have accompanied the preliminary results since they have had three consecutive years of no dumping margins. The companies have previously submitted requests for revocation and have done everything necessary to qualify for a tentative revocation.

*Department's Position:* We agree. The Department will publish a tentative

determination to revoke in part for various firms in a separate notice.

**Final Results of the Review**

Based on our analysis of the comments received and correction of

certain clerical errors, we have revised our preliminary results for Nissan Motor Co., Ltd., and we determine that the following weighted-average margins exist:

Manufacturer/exporter	Time period	Margin (percent)
Daido Kogyo Co., Ltd./Daido Corp.	4/01/81-3/31/83	0
Daido Kogyo/Meisei Trading Co.	4/01/81-3/31/83	0
Deer Island	4/01/81-3/31/83	<sup>1</sup> 15.92
Enuma Chain Mfg. Co., Ltd./Daido Corp.	4/01/81-3/31/83	0
Enuma Chain/Meisei Trading	4/01/81-3/31/83	0
Izumi Chain Mfg. Co., Ltd./Rocky Asia Co.	10/01/80-9/30/82	0
Izumi Chain/Shima Trading Co., Ltd.	10/01/80-9/30/81	0
Izumi Chain/All others	10/01/81-9/30/82	0.14
Katayama Chain Co., Ltd.	10/01/80-9/30/82	0
	4/01/81-3/31/82	0
	4/01/82-3/31/83	<sup>1</sup> 0
Mitsubishi Motors Corp.	4/01/81-3/31/83	0
Naniwa Kogyo Co., Ltd.	4/01/79-3/31/80	43.29
	4/01/80-3/31/81	0.90
	4/01/81-3/31/83	0
Nissan Motor Co., Ltd.	4/01/81-7/31/82	0
Suzuki Motor Co., Ltd.	4/01/81-3/31/83	0
Takasago Chain Co., Ltd./Central Industries Inc.	4/01/81-3/31/83	0
Takasago Chain/Royal Industries Ltd.	4/01/81-3/31/82	15.92
	4/01/82-3/31/83	<sup>1</sup> 15.92
Takasago Chain/Hitachi Metals Ltd.	4/01/81-3/31/82	0.35
	4/01/82-3/31/83	0.36
Yamakyu Chain Co., Ltd.	4/01/81-3/31/82	0
	4/01/82-3/31/83	<sup>1</sup> 0

<sup>1</sup> No shipments during the period.

The Department will instruct the Customs Service to assess antidumping duties on all appropriate entries. Individual differences between United States prices and foreign market value may vary from the percentages stated above. The Department will issue appraisal instructions on each exporter directly to the Customs Service.

Further, as provided by section 751(a)(1) of the Tariff Act, a cash deposit of estimated antidumping duties based on the most recent of the above margins shall be required for these firms. Since the margins for Izumi Chain/Shima Trading and Takasago Chain/Hitachi Metals are less than 0.5 percent and, therefore, de minimis for cash deposit purposes, the Department shall not require a cash deposit for these firms. For any shipments from the remaining known manufacturers and/or exporters not covered by this review, a cash deposit shall be required at the rates published in the final results of the last administrative review for each of those firms (48 FR 51801, November 14, 1983). For any future entries of this merchandise from a new exporter, not covered in this or prior administrative reviews, whose first shipments occurred after March 31, 1983 and who is unrelated to any reviewed firm or any

other previously reviewed firm no cash deposit shall be required. These deposit requirements are effective for all shipments of Japanese roller chain, other than bicycle, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice, and shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and § 353.53a of the Commerce Regulations (19 CFR 353.53a).

Dated: May 2, 1987.

Gilbert B. Kaplan,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 87-10954 Filed 5-12-87; 8:45 am]

BILLING CODE 3510-DS-M

**DEPARTMENT OF COMMERCE****Minority Business Development Agency****Financial Assistance Applications; Nevada**

**AGENCY:** Minority Business Development Agency, Commerce.

**ACTION:** Notice.

**SUMMARY:** The Minority Business Development Agency (MBDA) announces that it is soliciting applications under its Minority Business Development Center (MBDC) Program to operate a MBDC for a 3 year period, subject to available funds. The cost of performance for the first 12 months is estimated at \$194,118 for the project performance period of October 1, 1987 to September 30, 1988. The MBDC will operate in the Las Vegas Metropolitan Statistical Area (MSA). The first year cost for the MBDC will consist of \$165,000 in Federal funds and a minimum of \$29,118 in non-Federal funds (which can be a combination of cash, in-kind contribution and fees for services).

The I. D. Number for this project will be 09-10-87008-01.

The funding instrument for the MBDC will be a cooperative agreement and competition is open to individuals, nonprofit and for-profit organization, local and state governments, American Indian tribes and educational institutions.

The MBDC will provide management and technical assistance to eligible clients for the establishment and operation of businesses. The MBDC program is designed to assist those minority businesses that have the highest potential for success. In order to accomplish this, MBDA supports MBDC programs that can: coordinate and broker public and private sector resources on behalf of minority individuals and firms; offer them a full range of management and technical assistance; and serve as a conduit of information and assistance regarding minority business.

Applications will be judged on the experience and capability of the firm and its staff in addressing the needs of minority business individuals and organizations; the resources available to the firm in providing management and technical assistance; the firm's proposed approach to performing the work requirements included in the application; and the firm's estimated cost for providing such assistance. It is advisable that applicants have an existing office in the geographic region for which they are applying.

The MBDC will operate for a three (3) year period with periodic reviews culminating in annual evaluations to determine if funding for the project should continue. Continued funding will be at the discretion of MBDA based on such factors as the MBDC's satisfactory performance, the availability of funds, and Agency priorities.

A pre-application conference to assist all interested applicants will be held at the following address and time: Minority Business Development Agency, U.S. Department of Commerce, 221 Main Street, Room 1280, San Francisco, California 94105.

May 28, 1987 at 10:00 a.m.

Proposals are to be mailed to the following address: Minority Business Development Agency, U.S. Department of Commerce, San Francisco Regional Office, 221 Main Street, Room 1280, San Francisco, California 94105, 415/974-9597.

**Closing Date:** The closing date for applications is June 22, 1987. Applications must be postmarked by midnight June 22, 1987.

**FOR FURTHER INFORMATION CONTACT:** Dr. Xavier Mena, Regional Director, San Francisco Regional Office.

**SUPPLEMENTARY INFORMATION:** Questions concerning the preceding information, copies of application kits and applicable regulations can be obtained at the above address.

(Catalog of Federal Domestic Assistance 11.800 Minority Business Development).

Xavier Mena,  
Regional Director, San Francisco Regional Office.

[FR Doc. 87-10845 Filed 5-12-87; 8:45 am]

BILLING CODE 3510-21-M

## **National Telecommunications and Information Administration**

### **Frequency Management Advisory Council; Recharter**

**AGENCY:** National Telecommunications and Information Administration, Commerce.

**ACTION:** Notice of recharter for the Frequency Management Advisory Council.

**SUMMARY:** In accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 2 and General Services Administration (GSA) Interim Rule on Federal Advisory Committee Management, 41 CFR Part 101-6, as amended, and after consultation with GSA, the Secretary of Commerce has determined that the renewal of the Frequency Management Advisory Council is in the public interest in connection with the performance of duties imposed on the Department by law. Effective April 28, 1987, the Frequency Management Advisory Council has been rechartered.

The Council was first established on July 19, 1965, and was terminated on April 11, 1987. It provided advice to the Director of the Office of

Telecommunications Policy (OTP), Executive Office of the President, until that office was merged by Executive Order 12046 of March 27, 1978, into the Department of Commerce, National Telecommunications and Information Administration.

In reviewing the need for the Council, the Secretary has reaffirmed its original purpose of providing advice on radiofrequency spectrum allocation and assignment matters and means by which the effectiveness of Federal Government frequency management may be enhanced. Research indicates that the Council's function cannot be accomplished by any organizational element or other committee of the Department.

The Council shall continue with a balanced representation of 15 members, chaired by the Assistant Secretary of Commerce for Communications and Information or designee, and will operate in compliance with the provision of the Federal Advisory Committee Act.

Copies of the Council's renewed Charter has been filed with appropriate committees of Congress and with the Library of Congress.

**FOR FURTHER INFORMATION CONTACT:** Inquiries or comments may be addressed to the Committee Control Officer, Mr. Michael W. Allen, National Telecommunications and Information Administration, U.S. Department of Commerce, Room 4706, Washington, DC 20230; telephone: (202) 377-0805, or Suzette Kern, the Department Committee Management Analyst, telephone: (202) 377-4217.

Dated: April 28, 1987.

Michael W. Allen,  
Executive Secretary, Frequency Management Advisory Council, National Telecommunications and Information Administration.

[FR Doc. 87-10904 Filed 5-12-87; 8:45 am]

BILLING CODE 3510-60-M

## **COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS**

### **Adjustment of Import Limits for Certain Cotton Textile Products Produced or Manufactured in Sri Lanka**

May 8, 1987.

The Chairman of the Committee for the Implementation of Textile Agreements (CITA), under the authority contained in E.O. 11651 of March 3, 1972, as amended, has issued the directive

published below to the Commissioner of Customs to be effective on May 8, 1987. For further information contact Janet Heinzen, International Trade Specialist (202) 377-4212. For information on the quota status of these limits, please refer to the Quota Status Reports which are posted on the bulletin boards of each Customs port or call (202) 682-3075. For information on embargoes and quota re-openings, please call (202) 377-3715.

#### Background

A CITA directive dated August 7, 1985 (50 FR 32468), as amended, established an import limit for cotton textile products in Category 336, produced or manufactured in Sri Lanka and exported during the twelve-month period which began on June 1, 1985 and extended through May 31, 1986.

A further directive dated May 22, 1986 (51 FR 19249), as amended, established an import limit for Category 336, among others, for the twelve-month period which began on June 1, 1986 and extends through May 31, 1987.

The Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of May 10, 1983 between the Governments of the United States and Sri Lanka provides, among other things, for the carryover of shortfalls in certain categories from the previous agreement year. Carryover is being applied to the current year limit for Category 336. The 1985-1986 limit for Category 336 is being reduced accordingly.

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the *Federal Register* on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924), December 14, 1983 (48 FR 55607), December 30, 1983 (48 FR 57584), April 4, 1984 (49 FR 13397), June 28, 1984 (49 FR 26622), July 16, 1984 (49 FR 28754), November 9, 1984 (49 FR 44782), July 14, 1986 (51 FR 25386), July 29, 1986 (51 FR 27068) and in Statistical Headnote 5, Schedule 3 of the *Tariff Schedules of the United States Annotated* (1987).

Ronald I. Levin,

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

May 8, 1987.

#### Committee for the Implementation of Textile Agreements

May 8, 1987

Commissioner of Customs,  
Department of the Treasury, Washington, DC 20229.

Dear Mr. Commissioner: This directive amends, but does not cancel, the directives issued to you on August 7, 1985 and May 22, 1986 by the Chairman of the Committee for the Implementation of Textile Agreements

concerning certain cotton, wool, and man-made fiber textile products, produced or manufactured in Sri Lanka and exported during the twelve-month periods which began on June 1, 1985 and June 1, 1986.

Effective on May 8, 1987, the directives of August 7, 1985 and May 22, 1986 are hereby amended to adjust the previously established restraint limits for Category 336 under the terms of the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of May 10, 1983<sup>1</sup>:

Category	Adjusted 12-mo. limit
June 1, 1985—May 31, 1986: 336 .....	60,416 doz. <sup>1</sup>
June 1, 1986—May 31, 1987: 336 .....	77,910 doz. <sup>2</sup>

<sup>1</sup> The limit has not been adjusted to account for imports exported after May 31, 1984.

<sup>2</sup> The limit has not been adjusted to account for imports exported after May 31, 1985.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553.

Sincerely,

Ronald I. Levin,

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 87-10948 Filed 5-12-87; 8:45 am]

BILLING CODE 3510-DR-M

#### Amending Export Visa and Exempt Certification Requirements for Certain Textiles and Textile Products From India

The Chairman of the Committee for the Implementation of Textile Agreements (CITA), under the authority contained in E.O. 11651 of March 3, 1972, as amended, has issued the directive published below to the Commissioner of Customs to be effective on May 14, 1987. For further information contact Ann Fields, International Trade Specialist (202) 377-4212.

#### Background

A CITA directive dated November 26, 1979, as amended (44 FR 68504), established visa and exempt certification requirements for certain cotton, wool and man-made fiber textile products, produced or manufactured in India.

Under the terms of the Bilateral Cotton, Wool, Man-Made Fiber, Silk

<sup>1</sup> The agreement provides, in part, that (1) specific limits may be exceeded by designated percentages to account for swing, provided that an equal amount in equivalent square yards is deducted from another specific limit; and (2) specific limits may also be increased for carryover and carryforward.

Blends and Other Vegetable Fiber Textile Agreement of February 6, 1987, the Governments of the United States and India have agreed to further amend the export visa and exempt certification systems.

Merchandise in TSUSA numbers 360.0600, 360.1015, 360.1200, 360.7600, 360.7800, 361.4500, 361.5420 and 361.5426, as well as properly marked commercial samples, which are valued at U.S. \$250 or less, and items for the personal use of the importer, which accompany the traveler, do not require a visa or certification for entry and shall not be charged to agreement levels.

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the *Federal Register* on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924), December 14, 1983, (48 FR 55607), December 30, 1983 (48 FR 57584), April 4, 1984 (49 FR 13397), June 28, 1984 (49 FR 26622), July 16, 1984 (49 FR 28754), November 9, 1984 (49 FR 44782), July 29, 1986 (51 FR 27068) and in Statistical Headnote 5, Schedule 3 of the *Tariff Schedules of the United States Annotated* (1987).

Ronald I. Levin,

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

#### Committee for the Implementation of Textile Agreements

May 8, 1987.

Commissioner of Customs,  
Department of the Treasury,  
Washington, D.C. 20229.

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive issued to you on November 26, 1979, as amended, by the Chairman, Committee for the Implementation of Textile Agreements, which established export visa and exempt certification requirements for certain cotton, wool and man-made fiber textile products, produced or manufactured in India.

Effective on May 14, 1987, a visa or certification shall not be required for entry of merchandise in TSUSA numbers 360.0600, 360.1015, 360.1200, 360.7600, 360.7800, 361.4500, 361.5420 and 361.5426, as well as properly marked commercial samples, which are valued at U.S. \$250 or less, and items for the personal use of the importer, which accompany the traveler.

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553.

Sincerely,

Ronald I. Levin,

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 87-10949 Filed 5-12-87; 8:45 am]

BILLING CODE 3510-DR-N

**DEPARTMENT OF DEFENSE****Department of the Army****Army Science Board; Closed Meeting**

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), announcement is made of the following Committee Meeting:

Name of the committee: Army Science Board (ASB).

Dates of meeting: June 2-3, 1987.

Time of meeting: 0830-1600 hours each day.

Place: Center for Night Vision and Electro-Optics, Fort Belvoir Virginia.

Agenda: The ASB Ad Hoc Subgroup on U.S. Army CECOM RD&E Center Effectiveness Review will visit the Center for Night Vision and Electro-Optics, Fort Belvoir, for the purpose of gathering data for the effectiveness review of the CECOM facility. Briefings will be presented by each division covering their work program. The Commander, LABCOM, will interact with the panel to discuss the relationship of LABCOM to the RD&E Centers. In addition, representatives from several TRADOC schools will meet with the panel to discuss their relationship the CECOM RD&E Center. This meeting will be closed to the public in accordance with section 552b(c) of Title 5, U.S.C., specifically subparagraph (1) thereof, and Title 5, U.S.C., Appendix 1, subsection 10(d).

The classified and nonclassified matters to be discussed are so inextricably intertwined so as to preclude opening any portion of the meeting. The ASB Administrative Officer, Sally Warner, may be contacted for further information at (202) 695-3039 or 695-7046.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 87-10862 Filed 5-12-87; 8:45 am]

BILLING CODE 3710-08-M

**DEPARTMENT OF EDUCATION****Notice of Proposed Information Collection Requests**

**AGENCY:** Department of Education.

**ACTION:** Notice of proposed information collection requests.

**SUMMARY:** The Director, Information Technology Services, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

**DATE:** Interested persons are invited to submit comments on or before June 12, 1987.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Desk Officer, Department of Education, Office of Management and Budget, 726 Jackson Place, NW., Room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Margaret B. Webster, Department of Education, 400 Maryland Avenue SW., Room 5624, Regional Office Building 3, Washington, DC 20202.

**FOR FURTHER INFORMATION CONTACT:** Margaret B. Webster (202) 732-3915.

**SUPPLEMENTARY INFORMATION:** Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to preform its statutory obligations.

The Director, Information Technology Services, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Agency form number (if any); (4) Frequency of collection; (5) The affected public; (6) Reporting burden; and/or (7) Recordkeeping burden; and (8) Abstract. OMB invites public comment at the address specified above. Copies of the requests are available from Margaret Webster at the address specified above.

Dated: May 7, 1987.

Carlos U. Rice,

Director for Information Technology Services.

**Office of Educational Research and Improvement**

**Type of review:** New.

**Title:** Final Financial Status and Performance Report for the Library Literacy Program.

**Agency form number:** G50-34P.

**Frequency:** Annually.

**Affected Public:** State or local Governments.

**Reporting burden:** Responses: 250.

**Burden hours:** 1,000.

**Recordkeeping burden:** Recordkeepers: 250. Burden hours: 250.

**Abstract:** This form will be used by state and local public libraries to report to the Department on the use of grant funds awarded under the Library Literacy Program, Title VI of Library Services and Construction Act, as amended. The Department uses this information to monitor performance and financial data.

**Office of Elementary and Secondary Education**

**Type of review:** Revision.

**Title:** Project Performance Reports for the Indian Education Programs.

**Agency form number:** ED 354-1.

**Frequency:** Annually.

**Affected public:** State or local governments.

**Reporting burden:** Responses: 1200.

**Burden hours:** 2400.

**Recordkeeping burden:** Recordkeepers: 1200. Burden hours: 1200.

**Abstract:** The project performance report requests information from formula grantees to be used for program assessment, planning and reporting purposes, as well as determine compliance with program regulations.

**Office of Special Education and Rehabilitative Services**

**Type of review:** Extension.

**Title:** State Agency Project And Local Educational Agency Recordkeeping.

**Agency form number:** B20-19P.

**Frequency:** NA

**Affected public:** State or local governments.

**Reporting burden:** Responses: 0. Burden hours: 0.

**Recordkeeping burden:** Recordkeepers: 158. Burden hours: 500.

**Abstract:** In order to receive a sub-grant under Pub. L. 89-313, State Operated Programs and Local Educational Agencies for Handicapped children must submit an application for a sub-grant to the State Education Agency.

[FR Doc. 87-10891 Filed 5-12-87; 8:45 am]

BILLING CODE 4000-01-M

[CFDA No. 84.199]

**Applications for New Awards under the Drug-Free Schools and Communities—Hawaiian Natives Program**

**Purpose:** Provides grants to organizations primarily serving and representing Hawaiian Natives which are recognized by the Governor of the State of Hawaii to plan, conduct, and administer alcohol and drug abuse

education and prevention programs for the benefit of Hawaiian Natives.

*Deadline for transmittal of applications:* June 30, 1987.

*Applications available:* May 15, 1987.  
*Available funds:* \$389,000.

*Estimated range of awards:* \$43,000–\$389,000.

*Estimated average size of awards:* Unknown.

*Estimated number of awards:* 1–9.

*Project period:* Up to 36 months.

*Applicable Regulations:*

(a) Regulations governing the Hawaiian Natives Program as proposed to be codified in 34 CFR Part 230. (A notice of proposed rulemaking for proposed Part 230 was published in the *Federal Register* on April 21, 1987 at 52 13212. Applicants should prepare their applications based on the proposed regulations. If there are any substantive changes made in the regulations when published in final form, applicants will be given the opportunity to amend or resubmit their applications); and

(b) The Education Department General Administrative Regulations (EDGAR) (34 CFR Parts 74, 75, 77 and 78).

*For Applications or Information*

*Contact:* Mr. Allen King, OESE Drug-Free Schools Task Force, U.S. Department of Education, 400 Maryland Avenue, SW., Room 2135, Washington, DC 20202. Telephone: (202) 732-4599.  
*Program Authority:* 20 U.S.C. 4645.

*Dated:* May 7, 1987.

Lois A. Bowman,

*Acting Assistant Secretary for Elementary and Secondary Education.*

[FR Doc. 87-10894 Filed 5-12-87; 8:45 am]

BILLING CODE 4000-01-M

[CFDA No. 84.003Q]

**Notice Inviting Applications for New Awards Under the Bilingual Education Program: State Educational Agency Program for Fiscal Year 1987**

*Action:* Deadline Date for Intergovernmental Review Comments. On April 23, 1987, the Department published a notice in the *Federal Register* (52 FR 13498) inviting applications for new awards under Bilingual Education: State Educational Agency Program for fiscal year 1987. In the notice, the deadline date was omitted for the receipt of intergovernmental review comments.

This notice establishes the deadline date for the intergovernmental review comments as July 25, 1987.

*For further information contact:* Luis A. Catarineau at (202) 245-2922.

*Dated:* May 7, 1987.

Carol Pendas Whitten,

*Director, Office of Bilingual Education and Minority Language Affairs.*

[FR Doc. 87-10892 Filed 5-12-87; 8:45 am]

BILLING CODE 4000-01-M

[CFDA No.: 84.023X]

**Invitation for Applications for New Awards Under the Research in Education of the Handicapped Program for Fiscal Year 1987**

**AGENCY:** Department of Education.

**ACTION:** Correction notice.

**SUMMARY:** On May 5, 1987 at 52 FR 16767, a notice establishing a closing date for the Early Childhood Research Institute—Policy under the Research in Education of the Handicapped Program was published in the *Federal Register*. On page 16767, in the first column, the deadline for intergovernmental review comments should be deleted. In the second column, under applicable regulations, item (b) should read: "(b) the Educational Department General Administrative Regulations, 34 CFR Parts 74, 75, 77, and 78, and".

*Dated:* May 8, 1987.

Madeleine Will,

*Assistant Secretary, Office of Special Education and Rehabilitative Services.*

[FR Doc. 87-10946 Filed 5-12-87; 8:45 am]

BILLING CODE 4000-01-M

**National Advisory Council on Educational Research and Improvement; Meeting**

**AGENCY:** National Advisory Council on Educational Research and Improvement.

**ACTION:** Full Council Meeting on the National Advisory Council on Educational Research and Improvement.

**SUMMARY:** This notice sets forth the schedule and agenda of a forthcoming meeting of the National Advisory Council on Educational Research and Improvement. This notice also describes the functions of the Council. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act.

**DATE:** June 4 and 5, 1987.

**ADDRESS:** The Council will meet on June 4 from 9:30 a.m. to 4:30 p.m. at the North Carolina School of Science and Math, 1219 Broad Street, Durham, NC 27705. The Council will meet on June 5 from 9:00 a.m. to 1:30 p.m. at the Sheraton University Center, 2800 Middleton Avenue at Morreene Road and 15-501, Durham, NC 27705.

**FOR FURTHER INFORMATION CONTACT:**

Mary Grace Lucier, Executive Director, National Advisory Council on Educational Research and Improvement, 2000 L Street, NW., Suite 617-B, Washington, DC 20036, (202) 254-7490.

**SUPPLEMENTARY INFORMATION:** The National Advisory Council on Educational Research and Improvement is established under section 405 of the General Education Provisions Act (20 USC 1221 e); Department of Education organization plan implemented pursuant to section 413 of Pub. L. 96-88 and notice to Congress dated July 2, 1985. The Council is established to advise the Secretary of Education on policies and priorities for the Office of Educational Research and Improvement (OERI), and to review the conduct of OERI and to advise the Secretary of Education and the Assistant Secretary for OERI on the development of programs to be carried out by OERI.

Meetings of the Council are open to the public. The agenda for June 4 includes a tour of the North Carolina School of Science and Math; a briefing on the residential secondary school program, outreach programs, and admissions process; a working luncheon with the teachers at the school; and presentations by representatives of regional educational laboratories. The agenda for June 5 includes reports from three Council Members and one staff member, and discussion of the proposed expansion of the National Assessment of Educational Progress.

Records are kept of all Council Proceedings and are available for public inspection at the Office of the National Advisory Council on Educational Research and Improvement, 2000 L Street, NW., Suite 617-B, Washington, DC 20036, from the hours of 9:00 a.m. to 5:00 p.m. Monday through Friday.

*Dated:* May 8, 1987.

Mary Grace Lucier,  
*Executive Director.*

[FR Doc. 87-10930 Filed 5-12-87; 8:45 am]

BILLING CODE 4000-01-M

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

[Project Nos. 9193-001 et al.]

**Hydroelectric Applications (Riverdale Hydro Associates et al.); Applications Filed With the Commission**

Take notice that the following hydroelectric applications have been filed with the Federal Energy Regulatory

Commission and are available for public inspection:

- 1 a. Type of Application: License (under 5MW).
  - b. Project No.: 9193-001.
  - c. Date Filed: March 24, 1986.
  - d. Applicant: Riverdale Hydro Associates.
  - e. Name of Project: Davis-Weber Canal Hydro Project.
  - f. Location: On Davis-Weber Canal in Weber County, Utah: Section 19, 29, 33, 34, 35, 36, T5N, R1W; Section 30, T5N, R1E: SLB&M.
  - g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a) through 825(r).
  - h. Contact Person: Mr. Michael J. Graham, P.O. Box N, Manti, UT 84642.
  - i. Comment Date: June 8, 1987.
  - j. Description of Project: The proposed project would utilize an abandoned project site of the Utah Power & Light Company and would consist of: (1) A concrete diversion structure, about 15 feet high and 180 feet long; (2) a concrete lined canal about 42,462 feet long; (3) an intake structure and a 72-inch-diameter steel penstock, about 1,405 feet long; (4) a powerhouse with an installed capacity of 3,750 kW under a head of 200 feet; (5) a tailrace canal, 2,500 feet long, returning flow to the Weber River; (6) a 46-kV transmission line, 30 feet long, connecting to an existing substation; and (7) appurtenant facilities. The applicant estimates that the average annual energy output would be 19,115,640 kWh.
  - k. Purpose of Project: Project energy would be sold to the Utah Power & Light Company.
  - l. This notice also consists of the following standard paragraphs: A3, A9, B, C, D1.
- 2 a. Type of Application: Preliminary Permit.
  - b. Project No.: 10204-000.
  - c. Date Filed: December 9, 1986.
  - d. Applicant: Northern Wasco County People's Utility District.
  - e. Name of Project: McNary Dam Fish Attraction Hydroelectric.
  - f. Location: At the Corps of Engineers McNary Dam on the Columbia River near Umatilla in Benton County, Washington.
  - g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a) through 825(r).
  - h. Contact Person: Harold E. Haake, Manager, Northern Wasco County People's Utility District, P.O. Box 621, The Dalles, OR 97058, (503) 296-2947.
  - i. Comment Date: June 8, 1987.
  - j. Description of Project: The proposed project would consist of: (1) A power plant with an installed capacity of 8.5 MW to be installed on two existing conduits of the auxiliary fish-water

supply system; and (2) an 1,800-foot-long transmission line connecting to an existing Bonneville Power Administration power line. The average annual energy production is estimated to be 70 GWh and the estimated cost of permit activities is \$162,000.

k. Purpose of Project: Power would be used in the Applicant's service area.

l. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

- 3 a. Type of Application: Exemption (less than 5 MW).
- b. Project No: 10087-000.
- c. Date Filed: September 18, 1986.
- d. Applicant: Reed Hydro-Electric Corporation.
- e. Name of Project: Savage River.
- f. Location: Savage River, Garrett County, Maryland.
- g. Filed Pursuant to: Section 408 of the Energy Security Act of 1980, 16 U.S.C. 2705 and 2709.
- h. Contact Person: Mr. John L. Reed, President, Reed Hydro-Electric Corporation, 5437 Morris Avenue, Number 1, Suitland, MD 20746, (301) 899-8988.

i. Comment Date:

j. Competing Application: Project No. 9697-000, Date Filed: 12/18/85.

k. Description of Project: The proposed project would consist of: (1) An existing earth and rockfill dam 184 feet high and 1,050 feet long, with a 10-foot-diameter outlet tunnel 1,170 feet long and an uncontrolled 320-foot-long spillway with crest elevation of 1,468.5 feet msl; (2) an existing impoundment with 366 acres surface area and 20,000 acre-feet storage capacity at a normal maximum surface elevation of 1,468.5 feet msl; (3) a proposed 9.5-foot-diameter steel penstock 820 feet long, to be installed within the existing outlet tunnel; (4) a proposed concrete powerhouse 40 feet long, 38 feet high, and 15 feet wide, enclosing two turbine-generator units of 3.2 MW combined capacity; (5) a proposed 7.2-kV transmission line 1/4 mile long; and (6) appurtenant facilities.

The existing facilities are owned and operated by the Upper Potomac River Commission. The estimated annual energy production would be 9.5 GWh. The hydraulic head would be 148 feet. Project power would be sold to Potomac Edison Company.

1. This notice also consists of the following standard paragraphs: A3, A9, B, C, and D3a.

m. Purpose of Exemption: An exemption, if issued, gives the Exemptee priority of control, development, and operation of the project under the terms of the exemption from licensing, and

protects the Exemptee from permit or license applicants that would seek to take or develop the project.

- 4 a. Type of Application: Exemption (5 MW or less).
- b. Project No.: 9785-000.
- c. Date Filed: December 30, 1985.
- d. Applicant: Dobbs Seed and Grain Company, Inc.
- e. Name of Project: Falls of Rough Hydroelectric.
- f. Location: On Rough River near Falls of Rough, Breckenridge and Grayson Counties, Kentucky.
- g. Filed Pursuant to: Energy Security Act of 1980, Section 408 (16 U.S.C. 2705 and 2708).
- h. Contact Person: Mr. Daniel R. Swan, Power Development Systems, 1712 Deerwood #3, Louisville, KY 40205-1053, (502) 451-1848.

i. Comment Date: June 8, 1987.

j. Description of Project: The proposed project would consist of: (1) An existing masonry gravity dam 10 feet high and approximately 150 feet long; (2) an existing 5-acre reservoir with a gross storage capacity of 25 acre-feet and a normal surface elevation of 440 feet MSL; (3) rebuilding an existing flume located at the east end of the dam to house two vertical turbines and two generators with a combined output of 110 kW; (4) restoring an existing tailrace; (5) a proposed transmission line 200 feet long; and (6) appurtenant facilities. The applicant estimates that the average annual energy generation would be 334 MWh.

k. This notice also consists of the following standard paragraphs: A3, A9, B, C, D3a.

- a. Type of Application: Preliminary Permit.
- b. Project No.: 10278-000.
- c. Date Filed: January 28, 1987.
- d. Applicant: Cascade River Hydro.
- e. Name of Project: Kindy Creek.
- f. Location: On Kindy Creek within the Snoqualmie-Mt. Baker National Forest in T34N, and T35N, R12E, near Marblemount in Skagit County, Washington.
- g. Filed Pursuant to: Federal Power Act 16 U.S.C. 791(a) through 825(r).
- h. Contact Person: Mr. Lawrence J. McMurtrey, 12122-196th Avenue, NE., Redmond, WA 98052, (206) 885-3986.
- i. Comment Date: June 18, 1987.
- j. Description of Project: The proposed run-of-the-river project would consist of: (1) A 3-foot-high concrete diversion structure at elevation 1,500 feet; (2) a 7,630-foot-long, 60-inch-diameter penstock; (3) a powerhouse containing one generating unit with a rated capacity of 2.44 MW; and (4) an 11-mile-long

transmission line. Applicant estimates the average annual energy production to be 10.9 GWh and a cost of \$40,000 for the work to be performed under the preliminary permit.

k. Purpose of Project: The power produced is to be sold to the local power company.

1. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

6 a. Type of Application: Preliminary Permit.

b. Project No.: 10292-000.

c. Date Filed: January 30, 1987.

d. Applicant: Washington Hydro Development Company.

e. Name of Project: Silver Creek.

f. Location: On Silver Creek, tributary of Baker Lake, within Snoqualmie-Mt. Baker National Forest in Whatcom County, Washington near the town of Concrete. T.37N., R.9E., sec. 3, SW ¼, S ½ NW ¼; sec. 10, W ½; sec. 1, 2, 3, 4, 8, 9, 17, 20, 29, 30, 31, 32.

g. Filed Pursuant to: Federal Power Act 16 U.S.C. 791(a) through 825(r).

h. Contact Person: Mr. Lawrence J. McMurtrey, President, Washington Hydro Development Company, 12122 196th Avenue NW., Redmond, WA 98052, (206) 885-3986.

i. Comment Date: June 18, 1987.

j. Description of Project: The proposed project would consist of: (1) A 36-inch-wide diversion-intake structure at elevation 2,500 feet; (2) an 18-inch-diameter, 6,000-foot-long penstock; (3) a powerhouse containing a single generating unit with an installed capacity of 2,067 kW, producing an average annual energy output of 9.06 GWh; (4) a tailrace; and (5) a 6-mile-long, 115-kV transmission line tying into an existing Puget Sound Power and Light Company line. No new roads will be needed to conduct the studies.

The applicant estimates that the cost of the studies to be conducted under the preliminary permit would be \$40,000.

k. Purpose of Project: Project power would be sold to Puget Sound Power & Light Company.

1. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

7 a. Type of Application: Preliminary Permit.

b. Project No.: 10340-000.

c. Date Filed: March 6, 1987.

d. Applicant: Trenton Falls Hydroelectric Company.

e. Name of Project: Downer Hill Road.

f. Location: Hinckley-Utica Water Transmission System in Oneida County, New York.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a) 825(r).

h. Contact Person: Mr. Fred T. Samel, P.O. Box 169, Prospect, NY 13435, (315) 733-8478.

i. Comment Date: June 17, 1987.

j. Description of Project: The proposed project would consist of: (1) Two existing adjacent water transmission pipes, 36 inches in diameter of ductile iron pipe and 24 inches in diameter of cast iron pipe approximately 64,000 feet long; (2) a proposed 32-foot-wide and 44-foot-long powerhouse to contain one turbine/generator with an installed capacity of 486 kW; (3) a proposed switchyard approximately 15 feet long and 15 feet wide; (4) a new three phase 13.2-kV transmission line approximately 2,100 feet long; and (5) appurtenant facilities. The existing facilities are owned by the City of Utica Board of Water Supply. The estimated average annual energy produced by the project would be 3.5 million kWh operating under a net hydraulic head of 160 feet. The applicant estimates that the cost of work to be performed under the preliminary permit would be \$49,500.

k. Purpose of Project: Project power will be sold to the Niagara Mohawk Power Corporation.

1. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

8 a. Type of Application: Preliminary Permit.

b. Project No.: 10355-000.

c. Date Filed: March 18, 1987.

d. Applicant: WV Hydro, Inc.

e. Name of Project: Hildebrand.

f. Location: Monongahela River, Monongalia County, West Virginia.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a) 825(r).

h. Contact Person: Mr. James B. Price, WV Hydro, Inc., 120 Calumet Ct., Aiken, SC 29801, (803) 624-2749.

i. Comment Date: June 18, 1987.

j. Description of Project: The proposed project would use the existing Corps of Engineers' Hildebrand Lock and Dam and would consist of: (1) A powerhouse and integral intake structure 50 feet wide and 120 feet long housing one turbine-generator with a capacity of 10 MW and an average annual output of 32 GWh; (2) a switchyard located near the powerhouse; (3) a 600-foot-long, 138-kV transmission line; and (4) appurtenant facilities. Project power would be sold to Monongahela Power Company. The net hydraulic head would be 20 feet. Applicant estimates that the cost of the work to be performed under the preliminary permit would be \$100,000.

k. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

9 a. Type of Application: Preliminary Permit.

b. Project No.: 10234-000.

c. Date Filed: January 7, 1987.

d. Applicant: Bryant Mountain Hydroelectric Company.

e. Name of Project: Bryant Mountain Pumped Storage.

f. Location: On U.S. Bureau of Reclamation irrigation canal in Klamath County, Oregon near the town of Malin. T.40S., R.13E., sections 30, 31, 35, 36; section 25, SE ¼ of SE ¼; T.41S., R.12E., section 1, N ½ of NE ¼; section 6; section 7, NE ¼ of NW ¼, E ½; section 8, SW ¼ of SW ¼; section 17, SE ¼ of SW ¼; section 18, NE ¼ of NE ¼.

g. Filed Pursuant to: Federal Power Act 16 U.S.C. 791(a) through 825(r).

h. Contact Person: Mr. Bart M. O'Keeffe, Mutual Energy Co., Inc., P.O. Box 606565, Sacramento, CA 95860, (916) 971-3717.

i. Comment Date: June 19, 1987.

j. Description of Project: The proposed project would consist of: (1) A 100-foot-high, 1,600-foot-long earth dam; (2) the Worlow Meadows Reservoir enlarged to have a surface area of 210 acres, a storage capacity of 11,000 acre-feet at elevation 5,640 feet m.s.l.; (3) an intake structure; (4) an 18-foot-diameter power tunnel consisting of a 1,390-foot-high vertical section from the intake to elevation 4,250 feet and a 13,000-foot-long horizontal section extending to the powerhouse; (5) a powerhouse containing four generating units with a total installed capacity of 200 MW, producing approximately an average annual energy output of 600,000 MWh; (6) a 90-foot-high, 6,000-foot-long earth dam creating; (7) a 210-acre Lower Reservoir at Bryant Mountain with a storage capacity of 10,500 acre-feet at elevation 4,200 feet m.s.l.; (8) a 36-inch-diameter, 2.5-mile-long, pipeline extending from the pumping plant to the Lower Reservoir; (9) a pumping plant located on the "D" Canal; (10) a 4-mile-long transmission line tying into a Pacific Southwest Intertie at the Malin substation. No new access road will be needed to conduct the studies.

The Applicant estimates that the cost of the studies to be conducted under the preliminary permit would be \$1,000,000. The proposed project would be located on lands under the administration of the U.S. Bureau of Land Management and Oregon State Department of Forestry.

k. Purpose of Project: Project power would be sold to California private utility companies.

1. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

10 a. Type of Application: Preliminary Permit.

b. Project No.: 10290-000.

c. Date Filed: January 30, 1987.  
 d. Applicant: Washington Hydro Development Company.  
 e. Name of Project: Sandy & Dillard Creeks.  
 f. Location: On Sandy and Dillard Creeks within the Snoqualmie-Mt. Baker National Forest in Whatcom County, Washington near the town of Concrete. T.37N., R.8E., sec. 3, S.¼; sec. 4, SE¼SE¼; sec. 9, E¼; sec. 10; sec. 11, SW¼; sec. 14, W¼; sec. 15, sec. 16, E¼; sec. 23, N¼NW¼.  
 g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a) through 825(r).  
 h. Contact Person: Mr. Lawrence J. McMurtrey, President, Washington Hydro Development Company, 12122 196th Avenue NE., Redmond, WA 98052, (206) 885-3986.  
 i. Comment Date: June 19, 1987.  
 j. Description of Project: The proposed project would consist of developments on Sandy Creek and Dillard Creek. Both developments would consist of: (1) A 36-inch-wide diversion-intake structure at elevation 2,500 feet; (2) a 36-inch-diameter, 10,000-foot-long penstock; (3) a powerhouse containing a single generating unit with an installed capacity of 3,787 kW, producing an average annual energy output of 16.59 GWh; (4) a tailrace; (5) a 4-mile-long, 115-kV buried transmission line tying into an existing Puget Sound Power and Light Company line. No new access road will be needed to conduct the studies.  
 The applicant estimates that the cost of the studies to be conducted under the preliminary permit would be \$40,000.  
 k. Purpose of Project: Project power would be sold to Puget Sound Power and Light Company.  
 l. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.  
 11. a. Type of Application: Preliminary Permit.  
 b. Project No.: 10327-000.  
 c. Date Filed: February 17, 1987.  
 d. Applicant: BAF Enterprises, Inc.  
 e. Name of Project: Old Columbia Dam.  
 f. Location: On Duck River at mile 133.53 near Columbia, Maury County, Tennessee.  
 g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a) through 825(r).  
 h. Contact Person: Mr. Anthony J. Fant, P.O. Box 67, Crossville, AL 35962, (205) 528-7136.  
 i. Comment Date: June 19, 1987.  
 j. Description of Project: The proposed project would consist of: (1) An existing concrete gravity dam 22 feet high and 572 long; (2) an existing 16-acre reservoir with a storage capacity of 20 acre-feet at a surface elevation of 673 msl; (3) an

existing reinforced concrete powerhouse 46 feet long, 31 feet wide, and 65 feet high housing two proposed 500-kW hydropower units for a total capacity of 1.0 MW; (4) an existing tailrace 90 feet wide, 15 feet deep, and 30 feet long; (5) a proposed 12.5-kV transmission line 400 feet long; and (6) appurtenant facilities. The applicant estimates that the average annual energy generation would be 3.2 GWh, and that the cost of the work to be performed under the permit would be \$25,000. The project would be sold to the City of Columbia or the Tennessee Valley Authority. The dam is owned by the City of Columbia, Tennessee.  
 k. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.  
 12. a. Type of Application: Preliminary Permit.  
 b. Project No.: 10338-000.  
 c. Date Filed: March 4, 1987.  
 d. Applicant: Longhill Associates.  
 e. Name of Project: West Groton Water Power.  
 f. Location: On Squannacook River, near Town of Groton, in Middlesex County, Massachusetts.  
 g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a) through 825(r).  
 h. Contact Person: Mr. Paul H. Kirshen, Longhill Associates, 94 Farmers Row, Groton, MA 01450, (617) 448-6570.  
 i. Comment Date: June 19, 1987.  
 j. Description of Project: The proposed project would consist of: (1) An existing 18-foot-high, 1500-foot-long concrete dam owned by Helmer Nielsen; (2) an existing reservoir with a storage capacity of 110 acre-feet and surface area of 9 acres at normal maximum surface elevation of 230 feet (msl); (3) an existing intake structure located on the east side of the dam; (4) an existing 150-foot-long, 7-foot-diameter steel penstock; (5) an existing powerhouse, to be modified, containing a single generating unit with installed capacity of 210 kW at a design head of 18 feet; and (6) a proposed 100-foot-long transmission line connecting to an existing Groton Electric Light Department line.  
 The estimated average annual energy production is 9 million kWh. The project power would be sold to Groton Electric Light Department or to a nearby utility company. The applicant estimates that the cost of the work to be performed under the preliminary permit would be \$15,000.  
 k. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.  
 13. 1. Type of Application: Preliminary Permit.  
 b. Project No.: 10339-000.  
 c. Date Filed: March 5, 1987.

d. Applicant: Hydro Energy Development Corporation.  
 e. Name of Project: Emerald City Power Plant.  
 f. Location: On the Carbon River in T18N, R6E, near Carbonado in Pierce County, Washington.  
 g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a) through 825(r).  
 h. Contact Person: Mr. James P. Carrington, 50-116th Avenue, SE., Bellevue, WA 98004, (206) 454-6200.  
 i. Comment Date: June 19, 1987.  
 j. Description of Project: The proposed run-of-the-river project would consist of: (1) A 36-inch-wide concrete intake structure buried in the stream at elevation 1,420 feet; (2) a 21,800-foot-long, 84-inch-diameter penstock; (3) a powerhouse containing one generating unit with a rated capacity of 15,500 kW; (4) a 1-mile-long transmission line. Applicant estimates the average annual energy production to be 72.80 GWh and the cost of the work to be performed under the preliminary permit to be \$40,000.  
 k. Purpose of Project: The power produced is to be sold to the local power company.  
 l. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.  
*Standard Paragraphs*  
*A3. Development Application*  
 Any qualified development applicant desiring to file a competing application must submit to the Commission, on or before the specified comment date for the particular application, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified comment date for the particular application. Applications for preliminary permit will not be accepted in response to this notice.  
*A5. Preliminary Permit*  
 Anyone desiring to file a competing application for preliminary permit for the proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36 (1985)). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application.

A competing preliminary permit application must conform with 18 CFR 4.30(b) (1) and (9) and 4.36.

#### A7. Preliminary Permit

Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before the specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application.

A competing license application must conform with 18 CFR 4.30(b)(1) and (9) and 4.36.

#### A9. Notice of Intent

A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, include an unequivocal statement of intent to submit, if such an application may be filed, either (1) a preliminary permit application or (2) a development application (specify which type of application), and be served on the applicant(s) named in this public notice.

#### A10. Proposed Scope of Studies Under Permit

A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

#### B. Comments, Protests, or Motions to Intervene

Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of the Rules of Practice and Procedure, 18 CFR 385.210, 385.211, 385.214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

#### C. Filing and Service of Responsive Documents

Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST" or "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing is in response. Any of the above named documents must be filed by providing the original and the number of copies required by the Commission's regulations to: Kenneth F. Plumb, Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426. An additional copy must be sent to: Mr. Fred L. Springer, Director, Division of Project Management, Federal Energy Regulatory Commission, Room 203-RB, at the above address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

#### D1. Agency Comments

States, agencies established pursuant to Federal law that have the authority to prepare a comprehensive plan for improving, developing, and conserving a waterway affected by the project, Federal and State agencies exercising administration over fish and wildlife, flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and affected Indian tribes are requested to provide comments and recommendations for terms and conditions pursuant to the Federal Power Act as amended by the Electric Consumers Protection Act of 1986, the Fish and Wildlife Coordination Act, the Endangered Species Act, the National Historic Preservation Act, the Historical and Archeological Preservation Act, the National Environmental Policy Act, Pub. L. 88-29, and other applicable statutes. Recommended terms and conditions must be based on supporting technical data filed with the Commission along with the recommendations, in order to comply with the requirement in Section 313(b) of the Federal Power Act, 16 U.S.C. 8251 (b), that Commission findings as to facts must be supported by substantial evidence.

All other Federal, State, and local agencies that receive this notice through direct mailing from the Commission are requested to provide comments pursuant

to the statutes listed above. No other formal requests will be made. Responses should be confined to substantive issues relevant to the issuance of a license. A copy of the application may be obtained directly from the applicant. If an agency does not respond to the Commission within the time set for filing, it will be presumed to have no comments. One copy of an agency's response must also be sent to the Applicant's representatives.

#### D2. Agency Comments

Federal, State, and local agencies are invited to file comments on the described application. (A copy of the application may be obtained by agencies directly from the Applicant.) If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

#### D3a. Agency Comments

The U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the State Fish and Game agency(ies) are requested, for the purposes set forth in section 408 of the Energy Security Act of 1980, to file within 60 days from the date of issuance of this notice appropriate terms and conditions to protect any fish and wildlife resources or to otherwise carry out the provisions of the Fish and Wildlife Coordination Act. General comments concerning the project and its resources are requested; however, specific terms and conditions to be included as a condition of exemption must be clearly identified in the agency letter. If an agency does not file terms and conditions within this time period, that agency will be presumed to have none. Other Federal, State, and local agencies are requested to provide any comments they may have in accordance with their duties and responsibilities. No other formal requests for comments will be made. Comments should be confined to substantive issues relevant to the granting of an exemption. If an agency does not file comments within 60 days from the date of issuance of this notice, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Dated: May 8, 1987.

Kenneth F. Plumb,  
Secretary.

[FR Doc. 87-10934 Filed 5-12-87 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP87-295-000 et al.]

**Florida Gas Transmission Company et al, Natural Gas Certificate Filings**

May 6, 1987.

Take notice that the followings filings have been made with the Commission:

**1. Florida Gas Transmission Co.**

[Docket No. CP87-295-000]

Take notice that on April 17, 1987, Florida Gas Transmission Company (FGT), P.O. Box 1188, Houston, Texas 77251, filed in Docket No. CP87-295-000 a request pursuant to §§ 157.205, 157.211(b) and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.211(b) and 157.216) for authorization to abandon part of an existing sales lateral serving a municipal power plant belonging to Vero Beach, Florida, and to construct two new sales taps necessary to expand hourly deliveries of natural gas to the power plant, all under authorization issued in Docket No. CP82-553-000 and as more fully set forth in the request which is on file with the Commission and open to public inspection.

FGT states that it is currently making a direct sale of natural gas to Vero Beach for use in that city's municipal power plant in Indian River County, Florida. FGT explains that the plant is currently served by FGT's sales lateral that was constructed under the Commission's June 14, 1962, order in Docket No. G-18615 (26 FPC 318). FGT further states that the existing sales lateral consists of 9.3 miles of 4.5-inch pipeline and that the underlying sales agreement between FGT and Vero Beach provides for a maximum annual contract quantity of 3,690,000 dekatherms per year. It is asserted that Vero Beach and FGT have agreed to have FGT (1) install a second sales lateral with increased capacity for service to Vero Beach, (2) relocate a 350-foot section of the existing 4.5-inch sales lateral, (3) abandon in place a 1,570-foot section of the existing 4.5-inch sales lateral and, (4) construct two sales tapes and related meters. In order to implement this agreement, FGT requests authorization under the prior-notice procedure to construct the two new sales taps, including metering facilities and to abandon in place the 1,570-foot section. FGT asserts that the second lateral would consist of 11.3 miles of 8-inch lateral line, would qualify as an eligible facility defined in § 157.202(b)(2)(i) of the Commission's Regulations, and would be constructed under the authorization in § 157.208 (a)(2) of the Commission's Regulations.

FGT projects that the new facilities would permit Vero Beach to increase its maximum hourly takes to approximately 1,600 Mcf per hour. Further, FGT estimates that Vero Beach would take an additional 600,000 dekatherms per year reaching a total annual purchases level of 1,540,482 dekatherms per year.

FGT states that Vero Beach has agreed to reimburse FGT an initial amount of \$2,000,000 for the new facilities; and in the event total cost to construct the subject facilities exceeds \$2,068,000 then Vero Beach has agreed to reimburse to FGT any excess over that amount. Conversely, FGT would not refund to Vero Beach any amounts if the total cost of the project is less than \$2,000,000.

*Comment date:* June 22, 1987, in accordance with Standard Paragraph G at the end of this notice.

**2. Northern Natural Gas Co. Division of Enron Corp.**

[Docket No. CP87-299-000]

Take notice that on April 22, 1987, Northern Natural Gas Company, Division of Enron Corp. (Northern), 2223 Dodge Street, Omaha, Nebraska 68102, filed in Docket No. CP87-299-000, an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity for authorization to provide a compressor service for Williston Basin Interstate Pipeline Company (Williston), all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Specifically, Northern proposes to compress, at its Ft. Buford Compressor Station in McKenzie County, North Dakota, up to 48,000 Mcf of natural gas per day on behalf of Williston and amounts in excess of the 48,000 Mcf daily provided Northern has sufficient capacity. Northern would deliver these volumes of natural gas to Northern Border Pipeline Company in accordance with the provisions of a gas compression agreement dated April 10, 1987.

Northern states that the proposed compression would relieve a capacity problem on Williston's system during low periods of system sales. It is explained that the majority of gas produced in this area is gas associated with oil production. If compression is not available for such gas, it would necessitate the curtailment of oil production or the flaring of natural gas, according to Williston.

Northern proposes to charge Williston 10.79 cents per Mcf of natural gas compressed at Ft. Buford. Northern states that it proposes to render compression service to Williston for an

initial term of two years upon receipt of a certificate herein with an option to extend the term upon mutual written agreement.

*Comment date:* May 27, 1987, in accordance with Standard Paragraph F at the end of this notice.

**2. Northwest Alabama Gas District**

[Docket No. CP87-281-000]

Take notice that on April 8, 1987, Northwest Alabama Gas District (NWA), P.O. Box 129, 201 S.W. Second Street, Hamilton, Alabama 35570, filed in Docket No. CP87-281-000 pursuant to § 385.207 of the Commission's Rules of Practice and Procedure a petition for declaratory order finding that NWA, as a municipally-owned distribution system, is not an intrastate pipeline under the Natural Gas Policy Act of 1978 (NGPA) and, therefore certain transportation services it renders for Southern Natural Gas Company (Southern) are not subject to the Commission's orders and regulations implementing section 311 of the NGPA, all as more fully set forth in the petition of file with the Commission and open to public inspection.

NWA states that it is a municipally-owned utility district organized under laws of the State of Alabama for the purpose of constructing and operating natural gas systems in a number of Alabama municipalities. NWA states that it serves other Alabama towns under franchise agreements and rural customers located along its transmission lines, and that it sells gas at wholesale to six municipally-owned systems. NWA indicates that it operates approximately 250 miles of intrastate pipeline and obtains its gas supplies from Southern, Tennessee Gas Pipeline Company, and local natural gas fields in Lamar County, Alabama.

NWA explains that it performs a transportation service for Southern, an interstate pipeline, which was initiated in 1981. NWA explains that although it did not believe that the service for Southern fell within the scope of section 311, NWA acceded to the Commission staff's request that it seek rate approval and comply with the Commission's reporting requirements under section 311. NWA states that it received its rate approval in Docket No. ST81-194.

NWA notes that Order No. 436 permits grandfathered section 311 transportation to continue until the earlier of the expiration of the term or October 9, 1987. NWA further notes that its existing section 311 authorization for its service for Southern expired April 10, 1987. NWA states that if it elects to extend the service for Southern, it would

become subject to the open access provisions of Order No. 436.

NWA does not believe that a municipal distribution system was intended to be subjected to the provisions of section 311 of the NGPA. In addition, NWA asserts that it does not believe it is appropriate to operate its municipal system as an open access system. NWA states that it will be compelled to suspend its transportation for Southern until the Commission grants its petition for a declaratory order. Accordingly, NWA seeks a declaratory order which finds that NWA, as a municipally-owned distribution system, is not an intrastate pipeline under the NGPA. NWA states that a literal reading of the NGPA might suggest that municipal systems meet the definition of intrastate pipeline. However, NWA believes a consistent reading of Order No. 319 and section 2(17) of the NGPA indicates that a municipally-owned distribution system is a local distribution company and not an intrastate pipeline.

Comment date: May 27, 1987, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

#### 4. Southern Natural Gas Co.

[Docket No. CP86-460-002]

Take notice that on April 10, 1987, Southern Natural Gas Company (Southern), P.O. Box 2563, Birmingham, Alabama 35202-2563, filed in Docket No. CP86-460-002 a petition to amend the order issued June 20, 1986, as amended, pursuant to the Natural Gas Act so as to authorize Southern to increase the daily transportation quantity for the end-user, Bickerstaff Clay Products Company, Inc. (Bickerstaff), all as more fully set forth in the petition which is on file with the Commission and open to public inspection.

Southern states that by its order issued June 20, 1986, as amended, in this proceeding, the Commission authorized Southern to perform limited-term transportation service on behalf of the Utilities Board of the City of Phenix City, Alabama (Phenix City), acting as agent for Bickerstaff. It is stated that the certificate authorizes Southern to transport up to 1,500 MMBtu equivalent of natural gas per day for a term expiring June 20, 1987, and that the gas is used in Bickerstaff's plant in Phenix City, Alabama.

Southern states that it has received a request from Phenix City to continue the transportation service after the expiration of the existing certificate authorization. It is further stated that in a revision to its statement of policy

which was filed with the Commission in Docket Nos. CP86-277-000, et al., on February 17, 1987, Southern stated that it is willing to seek limited-term certificate authorization to transport gas for either a new shipper or an existing shipper through October 31, 1988. Southern indicates that accordingly, Southern and Phenix City have agreed to extend their term of their transportation agreement so that Southern may continue to serve Phenix City through October 31, 1988.

In addition to the extension of term proposed herein, Southern proposes to increase the transportation quantity from 1,500 MMBtu equivalent of natural gas per day to 3,900 MMBtu equivalent of gas per day. It is stated that Southern has been advised by Phenix City that Bickerstaff has arranged to obtain additional gas supplies in order to provide for increased requirements at its plant in Phenix City, Alabama. No other changes are proposed herein. No construction of facilities is proposed.

Comment date: May 27, 1987, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

#### 5. United Gas Pipe Line Company

[Docket No. CP87-298-000]

Take notice that on April 21, 1987, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas 77251-1478, filed in Docket No. CP87-298-000 an application pursuant to section 7(c) of the Natural Gas Act, as amended, for a certificate of public convenience and necessity authorizing an increase in the Maximum Daily Quantity (MDQ) of natural gas from 2,032 Mcf to 2,320 Mcf, at the Town Border Station servicing Simmesport/Moreauville, Avoyelles Parish, Louisiana and the construction and operation of a sales metering station to establish an independent delivery point to exclusively serve Simmesport, Louisiana, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

United States that Simmesport/Moreauville T. B. Station increase in MDQ is needed in order to meet current and future market demands and to achieve adequate service at both locations. Further, United States that it has supplies available to meet the proposed requirements and that the requested MDQ increase will not result in a net increase in demand on United's system but rather, will replace a small portion of the substantial attrition losses sustained in a week market, which United is experiencing.

United further states that Simmesport has experienced severe pressure problems on its system during peak periods and that Simmesport has received a Federal grant to construct pipeline facilities to bypass Moreauville and to connect directly to the proposed sales metering station, which would correct the pressure problems. Moreauville would continue to be served through the existing metering station, it is stated. United estimates the cost of the facilities would be \$47,100, which would be reimbursed by Simmesport.

Comment date: May 17, 1987, in accordance with Standard Paragraph F at the end of this notice.

#### 6. Southern Natural Gas Co.

[Docket No. CP87-291-000]

Take notice that on April 16, 1987, Southern Natural Gas Company (Southern), P.O. Box 2563, Birmingham, Alabama 35202-2563, filed in Docket No. CP87-291-000 an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the transportation of natural gas, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Southern proposes to transport up to 5,000 MMBtu of natural gas per day on an interruptible basis on behalf of the City of Dublin, Georgia (Dublin). Southern proposes to render the service for a limited term ending on October 31, 1988.

It is stated that Dublin has arranged to purchase natural gas from SNG Trading Inc., Texican Natural Gas Company, and Panhandle Trading Company. Dublin would cause gas to be delivered to Southern for transportation at existing points on Southern's system as specified in the transportation agreement between the parties, it is explained. It is further explained that Southern would redeliver natural gas to Dublin at the Dublin Meter Stations Nos. 1 and 2 in Baldwin and Laurens Counties, Georgia, an equivalent quantity of gas less 3.25 per cent for compressor fuel and company use gas; less any and all shrinkage, fuel or loss resulting from processing the gas; and less Dublin's pro-rata share of any gas delivered for Dublin's account which is lost or vented for any reason.

Southern states that Dublin would pay the following transportation rate:

(a) Where the aggregate of the volumes transported and redelivered by Southern on any day to Dublin under any and all transportation agreements with Southern, when added to the volumes of gas delivered under

Southern's Rate Schedule OCD on such day to Dublin do not exceed the daily contract demand of Dublin, the transportation rate would be 48.2 cents per MMBtu; and

(b) Where the aggregate of the volumes transported and redelivered by Southern on any day to Dublin under any and all transportation agreements with Southern, when added to the volumes of gas delivered under Southern's Rate Schedule OCD on such day to Dublin exceed the daily contract demand of Dublin, the transportation rate for the excess volumes would be 77.6 cents per MMBtu.

Dubin would also pay the GRI surcharge of 1.52 cents per Mcf, it is explained.

Comment date: May 27, 1986, in accordance with Standard Paragraph F at the end of this notice.

#### Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be

unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Kenneth F. Plumb,  
Secretary.

[FR Doc. 87-10915 Filed 5-12-87; 8:45 am]  
BILLING CODE 6717-01-M

#### [Docket No. CP97-46-001]

#### Alabama-Tennessee Natural Gas Co.; Proposed Changes in FERC Gas Tariff

May 7, 1987.

Take notice that on April 30, 1987 Alabama-Tennessee Natural Gas Company (Alabama-Tennessee) tendered for filing Original Volume No. 2 to its FERC Gas Tariff, Original Sheet Nos. 1 through 15, with a proposed effective date of March 16, 1987.

Alabama-Tennessee states that the purpose of the instant filing is to file a new Rate Schedule IT-1 to reflect the transportation service for the Tennessee Valley Authority authorized by the Commission in an order issued on March 16, 1987 in Docket No. CP87-46-000. Alabama-Tennessee requests that any necessary waiver of the Commission's Regulations be granted to permit it to become effective on March 16, 1987.

Alabama-Tennessee further states that copies of this filing were served upon its customers and interested state commissions and to all parties in Docket No. CP87-46-000.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rule 211 or Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before May 15, 1987. Protests will be considered by the

Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party to the proceeding must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,  
Secretary.

[FR Doc. 87-10936 Filed 5-12-87; 8:45 am]  
BILLING CODE 6717-01-M

#### [Docket No. RP87-14-003]

#### Algonquin Gas Transmission Co.; Motion To Place Proposed Rates Into Effect

May 7, 1987.

Take notice that on April 30, 1987, Algonquin Gas Transmission Company (Algonquin) tendered for filing with the Federal Energy Regulatory Commission (Commission) a motion to place into effect on May 1, 1987, revised tariff sheets to its FERC Gas Tariff, Second Revised Volume No. 1 and Original Volume No. 2. The sheets are identified on Appendix A to the filing.

Algonquin states that on November 28, 1986, the Commission issued its "Order Accepting for Filing and Suspending Tariff Sheets Subject to Refund and Conditions" in the above-referenced proceeding. *Algonquin Gas Transmission Company*, 37 FERC 61,196 (1986). By such order the Commission suspended the rates, but permitted them to take effect May 1, 1987. The purpose of the instant filing is to place into effect on May 1, 1987 the rates filed herein on October 31, 1986, except the rates for service under Rate Schedule F-4, as adjusted (1) to reflect intervening tracking filings, subsequent to the October 31, 1986 filing in this docket; (2) to eliminate section 9, Reimbursement of Contingent Gas Supply, from Rate Schedule WS-1, as required by the Commission's November 28, 1986 order; (3) to comply with Ordering Paragraph C of the Commission's November 28, 1986 order in this proceeding by eliminating the interim cost of gas adjustment provision, references to excess sales under Rate Schedule F-1, and references to Rate Schedule I; and (4) to comply with Ordering Paragraph (D) of the Commission's November 28, 1986 order by reflecting the Federal income tax rate of 46% currently in effect.

Algonquin is not moving to place in effect the revised rates set forth in the October 31, 1986, filing for F-4 service. Algonquin will continue in effect the lower initial rate for the F-4 service that

became effective on November 1, 1986. No costs are being shifted to other rate schedules by virtue of continuing the current F-4 rate filed in this docket. Based on these facts and Commission precedent, Algonquin believes it does not need a waiver of § 154.66 of the Commission's Regulations in order to continue in effect the current F-4 rate. In any event good cause exists for the granting of a waiver under § 154.66, if such is required. In this regard, Algonquin also requests waiver of the requirements of § 154.22 of the Commission's regulations if such is required. Additionally, Algonquin requests waiver of any and all other Commission regulations to the extent necessary to permit the revised tariff sheets to become effective May 1, 1987, subject to refund.

Algonquin has served a copy of this filing upon each affected party and interested state commission.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before May 14, 1987. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,  
Secretary.

[FR Doc. 87-10935 Filed 5-12-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. RP86-33-002 and RP86-91-002]

#### Midwestern Gas Transmission Co.; Filing of Changes in Rates

May 7, 1987.

Take Notice that on May 1, 1987, Midwestern Gas Transmission Company (Midwestern) filed the following revised tariff sheets to its FERC Gas Tariff to be effective June 1, 1987:

#### Original Volume No. 1

Twenty-fourth Revised Sheet No. 5  
Twenty-fifth Revised Sheet No. 6  
Fourth Revised Sheet No. 21  
Second Revised Sheet No. 28  
Seventh Revised Sheet No. 84

Second Revised Sheet Nos. 88, 92, 161, 162

Fourth Revised Sheet No. 163  
Third Revised Sheet No. 164  
Original Sheet No. 164A  
First Revised Sheet No. 165A  
Second Revised Sheet No. 166  
Original Sheet No. 166A  
Fifth Revised Sheet No. 168  
Second Revised Sheet No. 169A  
First Revised Sheet No. 191  
Original Sheet Nos. 293, 294

#### Original Volume No. 2

Fourteenth Revised Sheet No. 37  
Eighth Revised Sheet No. 62K  
Seventh Revised Sheet No. 62L  
Second Revised Sheet No. 62M  
Fourth Revised Sheet No. 68D  
Third Revised Sheet No. 68E

Midwestern states that the purpose of this filing is to place into effect Midwestern's Settlement Rates (with the exception of Rate Schedule T-5) and the D<sub>1</sub>-D<sub>2</sub> billing procedures for Midwestern's Northern System and Southern System set forth in a Stipulation and Agreement (the Stipulation) filed on September 15, 1986 in Docket Nos. RP86-33 and RP86-91 and certified to the Commission by the Administrative Law Judge on October 6, 1986. Midwestern proposes to implement the Settlement Rates and D<sub>1</sub>-D<sub>2</sub> billing procedures in advance of the Commission's expected approval of the Stipulation in order to provide its customers with the benefit of a net revenue decrease from its current non-gas rates of \$3.1 million annually on the Southern System and \$2.8 million annually on the Northern System, based on the settlement billing determinants set forth in the Stipulation.

Midwestern also states that revenues collected under the Settlement Rates and tariff provisions filed herein shall be subject to refund pending a final Commission order approving the Stipulation to the extent that Midwestern has any refund liability under the Natural Gas Act and the Commission's regulations.

Midwestern states further that it is not seeking surcharge protection and is taking the full risk, in the event the Stipulation is not approved or is approved with modifications unacceptable to Midwestern, that the revenues collected under the Settlement Rates and tariff provisions will be less than the revenues that would have been collected under the rates and tariff sheets otherwise in effect. However, in the event that the Commission disapproves the Stipulation or approves it with changes or modifications that are not acceptable to Midwestern, Midwestern requests the authority to

reinstate prospectively without suspension by the Commission the non-gas rates in effect on May 31, 1987, subject to the terms and conditions of the Commission's order of January 29, 1986, accepting Midwestern's rate filing in Docket No. RP86-33 for effectiveness as of January 1, 1986, subject to refund and other conditions. 34 FERC ¶ 61,110 (1986).

Midwestern states that copies of this filing have been served upon all parties to the referenced proceedings, all jurisdictional customers, and affected state regulatory commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before May 14, 1987. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,  
Secretary.

[FR Doc. 87-10937 Filed 5-12-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TA87-3-59-000, 001]

#### Northern Natural Gas Co.; Division of Enron Corp.; Alaskan Natural Gas Transportation System (ANGTS) Semi- Annual Rate Adjustment

May 7, 1987.

Take notice that on April 30, 1987, Northern Natural Gas Company, Division of Enron Corp. (Northern), tendered for filing with the Federal Energy Regulatory Commission (Commission) its regularly scheduled semi-annual ANGTS rate adjustment to be effective July 1, 1987 pursuant to Northern's F.E.R.C. Gas Tariff.

Since preparation of the last ANGTS transportation rate adjustment, Northern Border Pipeline's estimated transportation costs for 1987 have changed by such an insignificant amount that the impact of Northern's rates would be less than one mill per Mcf, it is stated. Therefore, Northern is not required to change its rates pursuant to paragraph 21.4 of Northern's F.E.R.C. Gas Tariff, Third Revised Volume No. 1

and Paragraph 4.4 of Northern's F.E.R.C. Gas Tariff, Original Volume No. 2. Accordingly, Northern is proposing to continue to bill and collect, effective July 1, 1987, the currently effective ANGTS rate component as authorized by the Commission in Docket No. TA87-1-59.

The Company states that copies of the filing have been mailed to each of its Gas Utilities customers and to interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before May 15, 1987. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,  
Secretary.

[FR Doc. 87-10938 Filed 5-12-87; 8:45 am]  
BILLING CODE 6717-01-M

[Docket No. EL87-31-000]

**Connecticut Municipal Electric Energy Cooperative vs. The Connecticut Light and Power Co. and Its Affiliates, Northeast Utilities, Holyoke Water Power Co., Holyoke Power and Electric Co., Western Massachusetts Electric Co., Northeast Nuclear Energy Co., and Northeast Utilities Service Co.; Filing of Complaint and Extension of Time**

April 30, 1987.

Take notice that on April 14, 1987, Connecticut Municipal Electric Energy Cooperative (CMEEC), tendered for filing a Complaint and Motion for partial Summary Disposition against Connecticut Light and Power Company (CL&P), concerning the terms, conditions and charges for service rendered under certain electric rate schedules.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 or 214 of the Commission's Rules of practice and procedure (18 CFR 385.211, 385.214). All such motions or protests

should be filed on or before May 14, 1987. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this motion are on file with the Commission and are available for public inspection.

On April 22, 1987, CL&P filed a motion for extension of time so that it can answer both the Complaint and Motion for Summary Disposition within the same time frame. CMEEC filed an answer on April 28, 1987 stating it does not oppose such an extension.

Notice is also given that CL&P may answer both the Complaint and Motion for Summary Disposition on or before May 14, 1987.

Kenneth F. Plumb,  
Secretary.

[FR Doc. 87-10916 Filed 5-13-87; 8:45 am]  
BILLING CODE 6717-01-M

**ENVIRONMENTAL PROTECTION AGENCY**

[OPP-50667; FRL 3196-8]

**Issuance of Experimental Use Permits; Duphar B.V. et al.**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA has granted experimental use permits to the following applicants. These permits are in accordance with, and subject to, the provisions of 40 CFR Part 172, which defines EPA procedures with respect to the use of pesticides for experimental purposes.

**FOR FURTHER INFORMATION CONTACT:**

By mail: Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street, NW., Washington, DC 20460.

In person or by telephone: Contact the product manager at the following address at the office location or telephone number cited in each experimental use permit.

**SUPPLEMENTARY INFORMATION:** EPA has issued the following experimental use permits.

**37100-EUP-7.** Issuance. Duphar B.V., c/o John W. Kennedy Consultants, Inc., 9101 Cherry Lane, Suite 113, Laurel, MD 20708-1133. This experimental use permit allows the use of 1,140 pounds of the insecticide diflubenzuron on oranges and grapefruits to evaluate the control of citrus rust mites. A total of 1,140 acres are involved; the program is authorized

only in the States of Florida and Texas. The experimental use permit is effective from September 15, 1986 to December 31, 1987. A temporary tolerance for residues of the active ingredient in or on oranges and grapefruits has been established. (Arturo Castillo, PM 32, Rm. 207, CM# 2, (703-557-2690))

**352-EUP-130.** Extension. E.I. duPont de Nemours & Company Inc., Walker's Mill Building, Barley Mill Plaza, Wilmington, DE 19898. This experimental use permit allows the use of 108.26 pounds of the herbicides methyl 3-[[[4-methoxy-6-methyl-1,3,5-triazin-2-yl)amino]carbonyl]amino[sulfonyl]-2-thiophenecarboxylate and methyl 2-[[[N-(4-methoxy-6-methyl-1,3,5-triazin-2-yl)methyl-amino]carbonyl]amino[sulfonyl]benzoate on barley and wheat to evaluate the control of weeds. A total of 4,000 acres are involved; the experimental use permit is authorized in the States of Arizona, California, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Washington, Wisconsin, and Wyoming. The experimental use permit is effective from March 6, 1987 to July 15, 1988. A temporary tolerance for residues of the active ingredients in or on barley and wheat has been established. (Richard Mountfort, PM 23, Rm. 237, CM# 2, (703-557-1830)).

**352-EUP-138.** Extension. E.I. duPont de Nemours & Company, Inc., Walker's Mill Building, Barley Mill Plaza, Wilmington, DE 19898. This experimental use permit allows the use of 105.6 pounds of the herbicides methyl 3-[[[4-methoxy-6-methyl-1,3,5-triazin-2-yl)amino]carbonyl]amino[sulfonyl]-2-thiophenecarboxylate and methyl 2-[[[4-methoxy-6-methyl-1,3,5-triazin-2-yl)amino]carbonyl]-amino[sulfonyl]benzoate on barley and wheat to evaluate the control of weeds. A total of 4,000 acres are involved; the program is authorized in the States of Alabama, Arkansas, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, Washington, and West Virginia. The experimental use permit is effective from February 10, 1987 to February 10, 1988. Temporary tolerances for residues of the active ingredients in or on barley and wheat have been established. (Robert Taylor, PM 25, CM# 2, Rm. 245, CM# 2, (703-557-1800))

**748-EUP-23. Extension.** PPG Industries, Inc., One PPG Place, Pittsburgh, PA 15272. This experimental use permit allows the use of 364 pounds of the herbicide lactofen on conifer seedbeds to evaluate the control of various weeds. A total of 308 acres are involved; the program is authorized only in the States of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia. The experimental use permit is effective from March 16, 1987 to April 15, 1988. (Richard Mountfort, PM 23, Rm. 237, CM# 2, (703-557-1830))

Persons wishing to review these experimental use permits are referred to the designated product managers. Inquiries concerning these permits should be directed to the persons cited above. It is suggested that interested persons call before visiting the EPA office, so that the appropriate file may be made available for inspection purposes from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

Authority: 7 U.S.C. 136c.

Dated: April 28, 1987.

Edwin F. Tinsworth,  
Director, Registration Division, Office of  
Pesticide Programs.

[FR Doc. 87-10363 Filed 5-12-87; 8:45 am]

BILLING CODE 6560-50-M

[PF-480; FRL 3196-7]

# **Pesticide Tolerance Petitions; Union Carbide Agricultural Products Co. et al.**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces the filing of pesticide and food/feed additive petitions by companies proposing tolerances and/or regulations for residues of certain pesticide chemicals in or on various commodities and the withdrawal of petitions previously published in the *Federal Register*.

**ADDRESS:** By mail, submit written comments identified by the control number [PF-480] to:

Information Services Section, (Attn: Product Manager (PM) named in each petition), Program Management and Support Division (TS-757C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

In person, bring comments to:

Room 236, CM# 2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted as a comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI).

Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Room 236 at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding holidays.

## **FOR FURTHER INFORMATION CONTACT:** By mail:

Registration Division (TS-767C), Attn: PM named in the petition, Environmental Protection Agency, Office of Pesticide Programs, 401 M Street, SW., Washington, DC 20460.

In person, contact the PM named in each petition at the following office location/telephone number:

Product manager	Office location/telephone number	Address
Dennis Edwards (PM-12).	Room 202, CM# 2, 703-557-2386.	EPA, 1921 Jefferson Davis Hwy, Arlington, VA 22202. Do.
George LaRocca (PM-15).	Room 204, CM# 2, 703-557-2400.	Do.
Lois Rossi (PM-21).	Room 227, CM# 2, 703-557-1900.	Do.
Richard Mountfort (PM-23).	Room 237, CM# 2, 703-557-1830.	Do.
Mr. Robert Taylor (PM-25).	Room 245, CM# 2, 703-557-1800.	Do.

**SUPPLEMENTARY INFORMATION:** EPA has received pesticide (PP) and/or food and feed additive (FAP) petitions as follows proposing tolerances or regulations for residues of certain pesticide chemicals in or on various agricultural commodities. Two pesticide petitions, previously published in the *Federal Register* had been withdrawn.

## **1. PP 7F3516**

Union Carbide Agricultural Products Co., Inc., P.O. Box 12014, T. W. Alexander Drive, Research Triangle Park, NC 27709. Proposes amending 40 CFR 180.407 by establishing a tolerance for the combined residues of the insecticide thiodicarb (dimethyl *N,N*-(thiobis[(methylamino) carbonyl]oxy) bis[ethanimidothioate]) and its metabolite methomyl (*S*-methyl *N*-(methylcarbamoyl)oxy)-thioacetimidate) in or on leafy vegetables at 30 ppm. The proposed

analytical method for determining residues is liquid gas chromatography. (PM-12)

## **2. FAP 7H5533**

Nor-Am Chemical Co., 3509 Silverside Road, P.O. Box 7495, Wilmington DE 19803. Proposes amending 21 CFR 561.195 by establishing a regulation to permit the combined residues of the insecticide amitraz (*N*-(2,4-dimethylphenyl)-*N*-[[[2,4-dimethylphenyl]imino]methyl]-*N*-methylmethanimidamide) and its metabolites containing the 2,4-dimethylaniline moiety in or on dried citrus pulp at 14.0 ppm and citrus molasses at 14.0 ppm. (PM-12).

## **3. PP 7F3498**

FMC Corp., Agricultural Chemical Group, 2000 Market St., Philadelphia, PA 19103. Proposes amending 40 CFR 180.418 by establishing a tolerance for the combined residues of the insecticide cypermethrin ( $\pm$ )  $\alpha$ -cyano-(3-phenoxyphenyl) methyl ( $\pm$ ) *cis*, *trans*-3-(2,2-dichloroethenyl)-2,2-dimethylcyclopropanecarboxylate) and its metabolites dichlorovinyl acid, *m*-phenoxybenzoic acid and cyperamide in or on bulb onions at 0.1 ppm. The proposed analytical method for determining residues is gas liquid chromatography. (PM-15)

## **4. PP 7F3500**

Merck and Co., Inc., Merck Sharp and Dohme Research Laboratories, Hillsborough Road, Three Bridges, NJ 08887. Proposes amending 40 CFR Part 180 by establishing a tolerance for the combined residues of the insecticide avermectin B1 and the delta 8,9-isomer in or on cottonseed at 0.005 ppm. The proposed analytical method for determining residues is liquid gas chromatography. (PM-15)

## **5. PP 7F3514**

FMC Corp., Agricultural Chemical Group, 2000 Market St., Philadelphia, PA 19103. Proposes amending 40 CFR 180.378 by establishing tolerances for the combined residues of the insecticide permethrin, (3-phenoxyphenyl) methyl 3-(2,2-dichloroethenyl)-2,2-dimethylcyclopropanecarboxylate and its metabolites, *cis* and *trans* 3-(2,2-dichloroethenyl)-2,2-dimethylcyclopropanecarboxylic acid, and 3-phenoxybenzyl alcohol in or on wheat grain at 0.05 ppm, wheat hay at 2.0 ppm and wheat straw at 2.0 ppm. The proposed analytical method for determining residues is liquid gas chromatography. (PM-15)

**6. PP 7F3481**

Rhone-Poulenc, Inc., Agrochemical Division, P.O. Box 125, Black Horse Lane, Monmouth Junction, NJ 08852. Proposes amending 40 CFR 180.399 by establishing a tolerance for the combined residues of the fungicide iprodione [3-(3,5-dichlorophenyl)-*N*-(methylethyl)-2,4-dioxo-1-imidazolidinecarboximide], its isomer 3-(1-methylethyl)-*N*-(3,5-dichlorophenyl)-2,4-dioxo-1-imidazolidinecarboximide, and its metabolite 3-(3,5-dichlorophenyl)-2,4-dioxo-1-imidazolidinecarboximide in or on leaf lettuce at 25.0 ppm. The proposed analytical method for determining residues is gas liquid chromatography. (PM-21).

**7. PP 7F3491**

E. I. Du Pont De Nemours & Co., Inc., Agricultural Products Department, Walker's Mill Building, Barley Mill Plaza, Wilmington, DE 19898. Proposes amending 40 CFR Part 180 by establishing tolerances for the combined residues of the fungicide 1-[bis(4-fluorophenyl) (methyl)silylmethyl]-1*H*-1,2,4-triazole and its metabolites [bis(4-fluorophenyl) methyl]silanol and [bis(4-fluorophenyl)-methylsilyl]methanol in or on apples at 0.3 ppm and grapes at 0.3 ppm. The proposed analytical method for determining residues is liquid gas chromatography. (PM-21)

**8. PP 7F3507**

Elanco Products Co., Plant Science Projects Development and Registration Division, P.O. Box 708 Greenfield, IN 46140. Proposes amending 40 CFR 180.421 by establishing tolerances for the residues of the fungicide fenarimol, [alpha-[2-chlorophenyl]-alpha-[4-chlorophenyl]-5-pyrimidinemethanol] in or on apples at 0.1 ppm and residues of fenarimol, [alpha-[2-chlorophenyl]-alpha-[4-chlorophenyl]-5-pyrimidinemethanol] and its metabolites, alpha-(2-chlorophenyl)-alpha-(4-chlorophenyl)-1,4-dihydro-5-pyrimidinemethanol and 5-[(2-chlorophenyl) (4-chlorophenyl)-methyl]-3,4-dihydro-4-pyrimidinol measured as the total of fenarimol, 2,4'-dichlorobenzophenone (DCBP) and 5-[(2-chlorophenyl) (4-chlorophenyl)-methyl]pyrimidine (DHF) in or on grapes at 0.3 ppm. The proposed analytical method for determining residues is gas chromatography. (PM-21)

**9. PP 7F3510**

Rhone-Poulenc Inc., Agrochemical Division P.O. Box 125, Black Horse Lane, Monmouth Junction, NJ 08852. Proposes amending 40 CFR 180.399 by establishing a tolerance for the

combined residues of the fungicide iprodione [3-(3,5-dichlorophenyl)-*N*-(methylethyl)-2,4-dioxo-1-imidazolidinecarboximide] and its isomer 3-(1-methylethyl)-*N*-(3,5-dichlorophenyl)-2,4-dioxo-1-imidazolidinecarboximide, and its metabolite 3-(3,5-dichlorophenyl)-2,4-dioxo-1-imidazolidinecarboximide in or on strawberries at 15.0 ppm. The proposed analytical method for determining residues is gas liquid chromatography. (PM-21)

**10. PP 7F3515**

E. I. du Pont De Nemours & Co., Inc., Agricultural Products Department, Walker's Mill Building, Barley Mill Plaza, Wilmington, DE 19898. Proposes amending 40 CFR Part 180 by establishing a tolerance for residues of the fungicide 1-[bis(4-fluorophenyl) (methyl)silylmethyl]-1*H*-1,2,4-triazole in or on bananas at 0.1 ppm. The proposed analytical method for determining residues in AMR-115-83. (PM-21).

**11. FAP 7H5530**

E. I. Du Pont De Nemours & Co., Inc., Agricultural Products Department, Walker's Mill Building, Barley Mill Plaza, Wilmington, DE 19898. Proposes amending Chapter I of 21 CFR by establishing regulations to permit the combined residues of the fungicide 1-[bis(4-fluorophenyl)- (methyl)silylmethyl]-1*H*-1,2,4-triazole and its metabolites [bis(4-fluorophenyl)methyl]silanol and [bis(4-fluorophenyl)-methylsilyl]methanol as follows:

- In 21 CFR Part 193—in or on raisins at 2.0 ppm.
- In 21 CFR Part 561—in or on apple pomace at 3.0 ppm, grape pomace at 4.0 ppm, and raisin waste at 2.0 ppm. (PM-21)

**12. FAP 7H5534**

Elanco Products Co., Plant Science Projects Development and Registration Division, P.O. Box 708 Greenfield, IN 46140. Proposes amending 21 CFR Part 561 by establishing a regulation to permit the residues of the fungicide fenarimol, [alpha-[2-chlorophenyl]-alpha-[4-chlorophenyl]-5-pyrimidinemethanol] in or on apple pomace (wet and dry) at 2.0 ppm and residues of the fungicide fenarimol, [alpha-[2-chlorophenyl]-alpha-[4-chlorophenyl]-5-pyrimidinemethanol] and its metabolites, alpha-(2-chlorophenyl)-alpha-(4-chlorophenyl)-1,4-dihydro-5-pyrimidinemethanol and 5-[(2-chlorophenyl) (4-chlorophenyl)-methyl]-3,4-dihydro-4-pyrimidinol measured as the total of fenarimol, 2,4'-dichlorobenzophenone (DCBP) and 5-[(2-chlorophenyl) (4-

chlorophenyl)methyl]pyrimidine (DHF) in or on grape pomace (wet & dry) at 3.0 ppm and raisin waste at 3.0 ppm. (PM-21)

**13. PP 7F3506**

E. I. du Pont de Nemours & Co., Inc., Agricultural Products Department, Walker's Mill Building Barley Mill Plaza, Wilmington, DE 19898. Proposes amending 40 CFR Part 180 by establishing a regulation to permit the residues of the herbicide methyl-2[[[(4,6-dimethoxy-pyrimidin-2-yl)amino] carbonyl]amino]sulfonyl]methyl]benzoate in or on rice at 0.02 ppm. The proposed analytical method for determining residues is high pressure liquid chromatography using a photoconductivity detector. (PM-23)

**14. PP 7F3508**

Union Chemical Division, Unocal Corp. c/o Delta Management Group, Fenwick Professional Park, 1414 Fenwick Lane, Silver Spring, MD 20910. Proposes amending 40 CFR 180.1084 by establishing an exemption from the requirement of a tolerance for monourea sulfuric acid adduct when used as a herbicide or desiccant in or on all raw agricultural commodities. The proposed analytical method for determining residues is pH titration and use of calibration curves. (PM-25)

**15. PP 7F3509**

ICI Americas Inc. Agricultural Chemical Division, Concord Pike & New Murphy Road, Wilmington, DE 19897. Proposes amending 40 CFR 180.205 by establishing tolerances to permit residues of the herbicide paraquat (1,1'-dimethyl-4,4'-bipyridinium-ion in or on peanuts 0.05 ppm, peanut hulls at 0.2 ppm, peanut vines at 0.5 ppm and peanut hay at 0.5 ppm. The proposed analytical method for determining residues is R-M-8-10. (PM-25)

**16.****a. PP 1F2144**

In the Federal Register of December 4, 1978, (43 FR 54830), EPA announced that Monsanto Agricultural Products Co., 800 N Lindberg Blvd., St. Louis, MO 63166, filed PP 9F2144 proposing a tolerance for the combined residues of the herbicide alachlor (2-chloro-2',6'-diethyl-*N*-methoxy-ethyl)acetanilide and its metabolites (calculated as alachlor) in or on the raw agricultural commodities sugarcane fodder and forage at 0.2 ppm.

**b. PP 1F2551**

In the Federal Register of October 27, 1981, (46 FR 52417), EPA announced that Monsanto Agricultural Products Co.,

filed PP 1F2551 proposing a tolerance for the combined residues of the herbicide alachlor and its metabolites (calculated as alachlor) in or on the raw agricultural commodity potatoes at 1.0 ppm.

Monsanto has withdrawn the petitions without prejudice to future filing in accordance with § 180.8. (PM-25).

Dated: April 29, 1987.

Edwin F. Tinsworth,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 87-10361 Filed 5-12-87; 8:45 am]

BILLING CODE 6560-50-M

[OPP-30279; FRL 3196-4]

### Certain Companies Applications To Register Pesticide Products; Rhom and Haas Co. et al.

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces receipt of applications to register pesticide products containing an active ingredient not included in any previously registered product pursuant to the provision of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

**DATE:** Comment by June 12, 1987.

**ADDRESS:** By mail submit comments identified by the document control number [OPP-30279] and the file symbol to:

Information Services Section (TS-757C), Program Management and Support Division, Attn: Product Manager (PM) 23, Office of Pesticide Programs, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

In person, bring comments to: Room 236, CM #2, Attn: PM 23, Registration Division (TS-767C), Environmental Protection Agency, 1921 Jefferson Davis Highway, Arlington, VA.

Information submitted in any comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice to the submitter. All written comments will be available for public inspection in Room 236 at the address given above, from 8 a.m. to 4

p.m., Monday through Friday, except legal holidays.

**FOR FURTHER INFORMATION CONTACT:** Richard Mountfort, PM 23, Room 237, CM#2, (703-557-1830).

**SUPPLEMENTARY INFORMATION:** EPA received applications as follows to register pesticide products containing an active ingredient not included in any previously registered products pursuant to the provision of section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

#### I. Products Containing an Active Ingredient not Included in any Previously Registered Product

##### 1. File Symbol: 707-ENN.

Applicant: Rohm and Haas Co., Independence Mall West, Philadelphia, PA 19105. Product name: RH-0265 2E Herbicide. Herbicide. Active ingredient: Fluoroglycofen: 2-ethoxy-2-oxoethy 5-[2-chloro-4-(trifluoromethyl) phenoxy]-2-nitrobenzoate 23.8%. Proposed classification/Use: General. For post emergence application to soybeans to control susceptible broadleaf annual weeds. (PM 23)

##### 2. File Symbol: 352-LNA.

Applicant E.I. du Pont de Nemours and Co, Inc., Agricultural Products Dept., Barley Plaza, Wilmington, DE 19898. Product name: Du Pont "Londax" Herbicide. Herbicide. Active ingredient: Methyl 2-[[[[(4-6-dimethoxy pyrimidin-2-yl)amino]carbonyl]amino]sulfonyl]methyl]benzoate 10%. Proposed classification/Use: General. For use on rice in the State of California only. (PM 23)

##### 3. File Symbol: 1471-RLI.

Applicant: Elanco Products, Co., Lilly Research Lab., PO Box 708, Greenfield, IN 46140. Product name: Isoxaben Technical. Herbicide. Active ingredient: N[3-(1-Ethyl-1-methylpropyl)-5-isoxazoly]2,6-dimethoxybenzamide and isomers 91%. Proposed classification/Use: General. For manufacturing use only in formulating herbicides. (PM 23)

##### 4. File Symbol: 1471-RLO.

Applicant: Elanco Products Co., Lilly Research Lab., PB Box 708, Greenfield, IN 46140. Product name: Prola \* 75 Dry Flowable. Herbicide. Active ingredient: N[3-(1-Ethyl-1-methylpropyl)-5-isoxazoly]2,6-dimethoxybenzamide and isomers 75%. Proposed classification/Use: General. For control of certain broadleaf weeds and annual grasses in established turf, landscape ornamentals, noncropland, and other areas. (PM 23)

Notice of approval or denial of an application to register a pesticide product will be announced in the *Federal Register*. The procedure for requesting data will be given in the *Federal Register* if an application is approved.

Comments received within the specified time period will be considered before a final decision is made; comments received after the time specified will be considered only to the extent possible without delaying processing of the application.

Written comments filed pursuant to this notice, will be available in the Program management and Support Division (PMSD) office at the address provided from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays. It is suggested that persons interested in reviewing the application file, telephone the PMSD office (703-557-3262), to ensure that the file is available on the date of intended visit.

Authority: 7 U.S.C. 136.

Dated: April 23, 1987.

Edwin F. Tinsworth,

Director, Registration Division Office of Pesticide Programs.

[FR Doc. 87-10362 Filed 5-12-87; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3199-9]

### Agency Information Collection Activities Under OMB Review

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** Section 3507(a)(2)(B) of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) requires the Agency to publish in the *Federal Register* a notice of proposed information collection requests (ICRs) that EPA has forwarded to the Office of Management and Budget (OMB) for review. The ICR describes the nature of the solicitation and the expected impact, and where appropriate includes the actual data collection instrument. The ICRs that follow are available for review and comment.

**FOR FURTHER INFORMATION CONTACT:** Patricia Minami, (202) 382-2712 (FTS 382-2712) or Jackie Rivers, (202) 382-2740 (FTS 382-2740).

### Office of Pesticides and Toxic Substances

Title: Premanufacture Notification (PMN) Rule #0574. (This extends a currently approved collection without change.)

**Abstract:** TSCA requires businesses to notify EPA 90 days prior to (a) the manufacture or import of a new chemical substance or (b) a significant new use of an existing chemical substance. EPA evaluates the effects of the chemical on human health and the environment as reported in the notification. If the Agency takes no regulatory action within 90 days of receipt of the notification, the applicant may manufacture or import the chemical. Respondents may apply for various exemptions that have shorter review times.

**Respondents:** Businesses manufacturing or importing new chemicals or using existing chemicals in a significant new way.

**Estimated Annual Burden:** 293,600 hours.

#### Office of Solid Waste and Emergency Response

**Title:** Survey of Hazardous Waste Treatment, Storage, Disposal and Recycling Facilities (EPA ICR #1364). (This is a new collection.)

**Abstract:** EPA will conduct a survey designed to develop a comprehensive data base on facilities that manage hazardous waste. The Agency will use the information in implementing regulations mandated by the Hazardous and Solid Waste Amendments (particularly the land disposal restrictions).

**Respondents:** Owners and operators of hazardous waste facilities.

**Estimated Annual Burden:** 92,000 hours.

#### Agency PRA Clearance Requests Completed by OMB

**EPA ICR #0229,** NPDES Discharge Monitoring Report, was approved 4/10/87 (OMB #2040-0004; expires 3/31/88).

**EPA ICR #0270,** State Drinking Water Supply Program Information, was extended 4/28/87 (OMB #2040-0090; expires 7/31/87).

**EPA ICR #0370,** Underground Injection Control Permit Application and Permittee Reporting, was extended 4/17/87 (OMB #2040-0042; expires 7/31/87).

**EPA ICR #0909,** Information Requirements for Construction Grants Delegation to States, was approved 4/10/87 (OMB #2040-0095; expires 4/30/90).

**EPA ICR #0916,** Annual Updates to National Emission Data System and Hazardous and Trace Emission System, was approved 4/15/87 (OMB #2060-0088; expires 10/31/89).

**EPA ICR #1037** Oral and Written Purchase Orders, was approved 4/9/87 (OMB #2030-0007; expires 4/30/90).

**EPA ICR #1055,** NSPS for Kraft Pulp Mills, was approved 4/15/87 (OMB #2060-0021; expires 4/30/90).

**EPA ICR #1131,** Standards of Performance for New Stationary Sources—Glass Manufacturing Plants, was approved 4/15/87 (OMB #2060-0054; expires 4/30/90).

**EPA ICR #1156,** NSPS for Synthetic Fiber Production Facilities, was approved 4/21/87 (OMB #2060-0059; expires 4/30/90).

**EPA ICR #1167,** NSPS for Lime Manufacturing Plants, was extended 4/17/87 (OMB #2060-0063; expires 7/31/87).

**EPA ICR #1168,** Rights in Data and Contract Requirements for Delivery of Additional Data, was extended 4/29/87 (OMB #2030-0012; expires 6/30/87).

**EPA ICR #1354,** Survey of UNAMAP Users, was approved 4/15/87 (OMB #2080-0028; expires 2/29/88).

Comments on the abstracts in this notice may be sent to:

Patricia Minami,  
U.S. Environmental Protection Agency,  
Office of Standards and Regulations  
(PM-223),  
Information and Regulatory Systems  
Division,  
401 M Street, SW.,  
Washington, DC 20460  
and  
Carlos Tellez,  
Office of Management and Budget,  
Office of Information and Regulatory  
Affairs,  
New Executive Office Building,  
726 Jackson Place, N.W.,  
Washington, DC 20503

Dated: May 7, 1987.

Odelia Funke,

Acting Director, Information and Regulatory  
Systems Division.

[FR Doc. 87-10912 Filed 5-12-87; 8:45 am]

BILLING CODE 6560-50-M

[PP 4G3031/T540; FRL-3200-3]

#### Metalaxyl; Extension of Temporary Tolerance

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA has extended a temporary tolerance for the combined residues of the fungicide metalaxyl and its metabolites in or on the raw agricultural commodity grapes.

**DATE:** This temporary tolerance expires September 30, 1987.

#### FOR FURTHER INFORMATION CONTACT:

By mail: Lois Rossi, Product Manager (PM) 21, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Office location and telephone number: Room 229, CM #2, 1921 Jefferson Davis Highway, Arlington, VA, (703-557-1900).

**SUPPLEMENTARY INFORMATION:** Ciba-Geigy Corp., Agricultural Products Division, P.O. Box 18300, Greensboro, NC 27419, has requested in pesticide petition PP 4G3031 the extension of temporary tolerance for the combined residues of the fungicide metalaxyl (*N*-(2,6-dimethylphenyl)-*N*-(methoxyacetyl)alanine, methyl ester) and its metabolites containing the 2,6-dimethylaniline moiety and *N*-(2-hydroxymethyl-6-methylphenyl)-*N*-(methoxyacetyl)alanine methyl ester, each expressed as metalaxyl in or on the raw agricultural commodity grapes at 2.0 parts per million (ppm).

This temporary tolerance has been extended to permit the continued marketing of the raw agricultural commodity named above when treated in accordance with the provisions of experimental use permit 100-EUP-81, which is being extended under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended (Pub. L. 95-396, 92 Stat. 819; 7 U.S.C. 136).

The scientific data reported and other relevant material were evaluated, and it was determined that the extension of this temporary tolerance will protect the public health. Therefore, the temporary tolerance has been extended on the condition that the pesticide be used in accordance with the experimental use permit and with the following provisions.

1. The total amount of the active fungicide to be used must not exceed the quantity authorized by the experimental use permit.

2. Ciba-Geigy Corp. must immediately notify the EPA of any findings from the experimental use that have a bearing on safety. The company must also keep records of production, distribution, and performance and on request make the records available to any authorized officer or employee of the EPA or the Food and Drug Administration.

This tolerance expires September 30, 1987. Residues not in excess of this amount remaining in or on the raw agricultural commodity after this expiration date will not be considered

actionable if the pesticide is legally applied during the term of, and in accordance with, the provisions of the experimental use permit and temporary tolerance. This tolerance may be revoked if the experimental use permit is revoked or if any experience with or scientific data on this pesticide indicate that such revocation is necessary to protect the public health.

The Office of Management and Budget has exempted this notice from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601 through 612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the *Federal Register* of May 4, 1981 (46 FR 24950).

Authority: 21 U.S.C. 346a(j).

Dated: May 4, 1987.

Edwin F. Tinsworth,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 87-10913 Filed 5-12-87; 8:45 am]

BILLING CODE 6560-50-M

[FRL 3201-2]

#### Science Advisory Board; Hazard Ranking System Review Subcommittee; Meeting

Notice is hereby given in accordance with Pub. L. 92-463 of a change in location of the Science Advisory Board's Hazard Ranking System Review Subcommittee (HRS) meeting to be held on May 19-20, 1987. Publication of the original agenda appeared in the *Federal Register* on Thursday, April 30, 1987, page 15763. The amended notice is to inform the public that the new location is: Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW., Washington, DC, Potomac Conference Room, Lobby Level. For further information, contact Kathleen W. Conway, Deputy Director, or Dorothy Clark, Staff Secretary, Science Advisory Board (202) 382-2552.

Dated: May 7, 1987.

Terry F. Yosie,

Director, Science Advisory Board.

[FR Doc. 87-11033 Filed 5-12-87; 8:45 am]

BILLING CODE 6560-50-M

#### FEDERAL MARITIME COMMISSION

##### Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the *Federal Register* in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224-010638-01.

Title: Port of Milwaukee Terminal Agreement.

Parties:

City of Milwaukee

Cal-Western Packaging Corporation

Synopsis:

The proposed amendment would provide that Cal-Western relinquish leased office space back to the City of Milwaukee, and reduce Cal-Western's rent in consideration of the relinquished office space.

Dated: May 8, 1987.

By order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 87-10900 Filed 5-12-87; 8:45 am]

BILLING CODE 6730-01-M

#### FEDERAL RESERVE SYSTEM

##### Agency Forms Under Review

May 7, 1987.

##### Background

On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act of 1980, as per 5 CFR 1320.9, "to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR 1320.9." Board-approved collections of information will be incorporated into the official OMB inventory of currently approved collections of information. A

copy of the SF 83 and supporting statement and the approved collection of information instrument(s) will be placed into OMB's public docket files. The following forms, which are being handled under this delegated authority, have received initial Board approval and are hereby published for comment. At the end of the comment period, the proposed information collection, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority.

**DATE:** Comments must be received by May 26, 1987.

**ADDRESS:** Comments, which should refer to the OMB Docket number (or Agency form number in the case of a new information collection that has not yet been assigned an OMB number), should be addressed to Mr. William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551, or delivered to room B-2223 between 8:45 a.m. and 5:15 p.m. Comments received may be inspected in room B-1122 between 8:45 a.m. and 5:15 p.m., except as provided in § 261.6(a) of the Board's Rules Regarding Availability of Information, 12 CFR 261.6(a).

A copy of the comments may also be submitted to the OMB desk officer for the Board: Robert Fishman, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

##### FOR FURTHER INFORMATION CONTACT:

A copy of the proposed form, the request for clearance (SF 83), supporting statement, instructions, and other documents that will be placed into OMB's public docket files once approved may be requested from the agency clearance officer, whose name appears below: Federal Reserve Board Clearance Officer Nancy Steele, Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202-452-3822).

##### Proposal To Approve Under OMB-Delegated Authority the Extension, With Revision, of the Following Reports

1. *Report Title: Weekly Report of Assets and Liabilities for Large Banks and Weekly Report of Selected Assets*

Agency form numbers: FR 2416 and FR 2644.

OMB Docket number: 7100-0075.

Frequency: Weekly.

Reporters: U.S. commercial banks.

Annual reporting hours: 48,932.

Small businesses are not affected.

General description of reports:

These reports are voluntary [12 U.S.C. 225(a) and 248(a)] and are given confidential treatment [5 U.S.C. 552(b) (4) and (8)]. The FR 2416 collects balance sheet information from a sample of large U.S. commercial banks and the FR 2644 collects information on selected assets from a stratified sample of smaller U.S. commercial banks. The Federal Reserve proposes to add an item to each report to obtain information on home equity loans. An additional minor change to the FR 2644—the inclusion of an "all other loan" category as a subcategory under total loans and leases—is also being proposed.

Board of Governors of the Federal Reserve System, May 7, 1987.

William W. Wiles,

Secretary of the Board.

[FR Doc. 87-10847 Filed 5-12-87; 8:45 am]

BILLING CODE 6210-01-M

#### **Beverly Bancorporation et al.; Applications To Engage de Novo in Permissible Nonbanking Activities**

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of

fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 5, 1987.

**A. Federal Reserve Bank of Chicago** (David S. Epstein, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Beverly Bancorporation*, Chicago, Illinois; to engage *de novo* through its subsidiary, *Beverly Trust Company*, Chicago, Illinois, in accepted, executing, administering, and handling of trust and estates of any and all kinds pursuant to § 225.25(b)(3) of the Board's Regulation Y.

2. *Capital One Corp.*, Brown Deer, Wisconsin; to engage *de novo* through its subsidiary, *Cap Funds, Inc.*, Brown Deer, Wisconsin, in loans or other extensions of credit such as made by banking, commercial, finance, mortgage and consumer finance companies pursuant to § 225.25(b)(1) of the Board's Regulation Y.

3. *Edville Bankcorp, Inc.*, Villa Park, Illinois; to engage *de novo* in the design and marketing computer software, associated materials, documentation and manuals pursuant to § 225.25(b)(7)(iii) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, May 7, 1987.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 87-10848 Filed 5-12-87; 8:45 am]

BILLING CODE 6210-01-M

#### **Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies; Gene Bihlmaier et al.**

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice

or to the offices of the Board of Governors. Comments must be received not later than May 28, 1987.

**A. Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Gene Bihlmaier*, Lloyd C. Bloomer, Leslie Kaser, and Eugene A. Mick, all of Osborne, Kansas; to acquire 20 percent of the voting shares of *Osborne Investments, Inc.*, Osborne, Kansas, and thereby indirectly acquire *The Farmers National Bank of Gaylord*, Gaylord, Kansas, and *Farmers National Bank*, Osborne, Kansas.

**B. Federal Reserve Bank of San Francisco** (Harry W. Green, Vice President) 101 Market Street, San Francisco, California 94105:

1. *S.A. Camp Companies*, Shafter, California; to acquire 14.08 percent of the voting shares of *Cal Rep Bancorp, Inc.*, Bakersfield, California, and thereby indirectly acquire *California Republic Bank*, Bakersfield, California.

Board of Governors of the Federal Reserve System, May 7, 1987.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 87-10849 Filed 5-12-87; 8:45 am]

BILLING CODE 6210-01-M

#### **Formation of, Acquisition by, or Merger of Bank Holding Companies; Eagle Fidelity, Inc.**

The company listed in this notice has applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that application or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Comments regarding this application must be received not later than May 27, 1987.

A. Federal Reserve Bank of Cleveland (John J. Wixted, Jr., Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101;

1. *Eagle Fidelity, Inc.*, Williamstown, Kentucky; to become a bank holding company by acquiring 100 percent of the voting shares of The Bank of Williamstown, Williamstown, Kentucky.

Board of Governors of the Federal Reserve System, May 7, 1987.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 87-10850 Filed 5-12-87; 8:45 am]

BILLING CODE 6210-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control

#### Methods for Rating Job Stress/Strain; Open Meeting

The following meeting will be convened by the National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control (CDC) and will be open to the public for observation and participation, limited only by the space available:

Date: May 29, 1987.

Time: 9 a.m.-3 p.m.

Place: Auditorium, Robert A. Taft Laboratories, 4676 Columbia Parkway, Cincinnati, Ohio 45226.

Purpose: To review and discuss the validation of two methodologies for assessing job stress/strain. Viewpoints and suggestions from industry, organized labor, academia, other government agencies, and the public are invited.

Additional information may be obtained from: Joseph J. Hurrell, Jr., Ph.D., Division of Biomedical and Behavioral Sciences, NIOSH, CDC, 4676 Columbia Parkway, Cincinnati, Ohio 45226, Telephones: FTS: 684-8293; Commercial: 513/533-8293.

Dated: May 6, 1987.

Elvin Hilyer,

Associate Director for Policy Coordination, Centers for Disease Control.

[FR Doc. 87-10846 Filed 5-12-87; 8:45 am]

BILLING CODE 4160-19-M

## Food and Drug Administration

[Docket No. 87N-0052]

### Action Levels for Residues of Aldrin and Dieldrin, Chlordane, and DDT, TDE, and DDE, in Food and Feed

AGENCY: Food and Drug Administration.

#### ACTION: Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that on February 13, 1987, the agency established new action levels and revised a number of its existing action levels for residues of the cancelled pesticides aldrin and dieldrin, chlordane, and DDT and TDE and their degradation product (DDE) in food and feed. FDA has taken this action in response to the Environmental Protection Agency's (EPA) recommendation that FDA establish action levels to replace tolerance and the food additive regulations for these pesticides that were revoked by EPA. The EPA action level recommendations are intended for unavoidable residues of these environmentally persistent pesticides in the food and feed commodities affected by the revocation of the tolerances and food additive regulations. Additionally, based upon EPA's recommendations, FDA has revised or reaffirmed the previously established FDA action levels for unavoidable residues of these pesticides in other food and feed commodities that had not been subject to EPA tolerances or food additive regulations. Attachments A, B.1, B.3, and B.5 of FDA's Compliance Policy Guide 7141.01 have been revised to reflect these changes.

**DATE:** Written comments by July 13, 1987.

**ADDRESS:** Written comments concerning the new and revised action levels for residues of aldrin and dieldrin, chlordane, and DDT, TDE, and DDE, and requests for single copies of FDA Compliance Policy Guide 7141.01, Attachments A, B.1, B.3, and B.5, should be submitted to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 3-62, 5600 Fishers Lane, Rockville, MD 20857.

#### FOR FURTHER INFORMATION CONTACT:

John R. Wessel, Office of Regulatory Affairs (HFC-205), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-1815.

**SUPPLEMENTARY INFORMATION:** In the Federal Register of December 24, 1987, EPA issued final rules that revoked: (1) The tolerances in 40 CFR 180.135 and 180.137 for the pesticides aldrin and dieldrin in raw agricultural commodities (51 FR 46662); (2) the tolerances in 40 CFR 180.122 and interim tolerances in 40 CFR 180.319 for the pesticide chlordane in raw agricultural commodities (51 FR 46665); (3) the tolerances in 40 CFR 180.147 and 180.147b for the pesticide

DDT and its degradation products TDE and DDE in raw agricultural commodities (51 FR 46658); (4) the tolerances in 40 CFR 180.187 for the pesticide TDE in raw agricultural commodities (51 FR 46658); (5) the food additive regulations in 21 CFR 193.110, 193.120, and 561.120 for DDT and its degradation products TDE and DDE in processed food and feed (51 FR 46616); and (6) the food additive regulation in 21 CFR 561.370 for TDE in processed feed (51 FR 46616). Additionally, in the final rules concerning DDT and TDE (51 FR 46658 and 46616), EPA revised the tolerance in 40 CFR 180.138 and food additive regulation in 21 CFR 193.450 to delete the permissible limits for DDT in combination with the pesticide toxaphene in soybeans and crude soybean oil, respectively. EPA revoked these tolerances and food additives regulations because all registered food uses of the pesticides had previously been cancelled.

EPA recommended in the preamble to its final rules and in letters dated December 15, 1986, from the Assistant Administrator for Pesticides and Toxic Substances, EPA, to the Associate Commissioner for Regulatory Affairs, FDA, that FDA establish specified action levels to replace the tolerances and food additives regulations. These action levels are necessary to regulate unavoidable residues of these environmentally persistent pesticides in the food and feed commodities that had previously been covered by tolerances and food additives regulations. They were recommended in accordance with EPA's policy statement on the revocation of tolerances for cancelled pesticides, which was published in the Federal Register of September 29, 1982 (47 FR 42956). Additionally, in the preamble of its final rules and its letters, EPA recommended revision or reaffirmation of FDA's previously established action levels for unavoidable residues of aldrin and dieldrin, chlordane, and DDT, TDE, and DDE in food and feed commodities that were not subject to EPA tolerances for food additives regulations. EPA did not, however, make any recommendations for FDA's action levels for these pesticides in fish. EPA indicated that these action levels require further assessment, and until this assessment is completed, EPA will defer making recommendations on them to FDA.

In considering EPA's action level recommendations, FDA combined a number of individual commodities subject to action levels into crop groups,

as specified in 40 CFR 180.34(f). For example, the crop group "stone fruits" includes apricots, cherries, nectarines, and plums.

For the action levels listed for crops groups, exceptions are noted for those commodities in the group that were not subject to an action level recommendation or that were subject to a different action level recommendation than the other commodities in that group.

FDA also combined some individual commodities into a single commodity type, as specified in 40 CFR 180.1(h). For example, pumpkins and summer squash are included in the listings for squash.

FDA found some discrepancies between the action level listing in the letters dated December 15, 1986, from the Assistant Administrator of EPA and EPA's Federal Register notices. Peppers and sweet potatoes were omitted from the list of commodities in the table of recommended action levels for aldrin and dieldrin and the recommended action level for peanuts is incorrect (i.e., 0.5 part per million is listed rather than 0.05 part per million). Oat grain (one of the cereal grains) is not listed in the table of recommended action levels for DDT, TDE, and DDE and although milk is listed, no recommended action level is given. EPA will correct these discrepancies in the future Federal Register publication. They have assured us that the recommended action levels contained in the referenced letters from EPA are correct. In this notice, FDA has listed the correct action levels.

On February 13, 1987, FDA established the new and revised action levels for unavoidable residues of aldrin and dieldrin, chlordane, and DDT, TDE, and DDE based on the recommendations by EPA. Attachments B.1, B.3, and B.5 of FDA Compliance Policy Guide 7141.01, which listed the aldrin and dieldrin, chlordane, and DDT, TDE, and DDE action levels previously established by FDA, have been revised to reflect these changes. In Tables I, II, and III below, action levels for crop groups cover all commodities specified in 40 CFR 180.34(f), except where an exception is noted.

The following action levels are for residues of the pesticides aldrin and dieldrin individually or in combination.

TABLE I—ALDRIN AND DIELDRIN

Commodities	Action level (parts per million)
Alfalfa	0.03
Animal feed, processed	0.03

TABLE I—ALDRIN AND DIELDRIN—Continued

Commodities	Action level (parts per million)
Artichokes	0.05
Asparagus	0.03
Bananas	0.02
Beets (garden and sugar)	0.1
Beet tops (garden and sugar)	0.05
Broccoli	0.03
Brussels sprouts	0.03
Bulb vegetables	0.1
Cabbage	0.03
Carrots	0.1
Cauliflower	0.03
Cereal grains (except buckwheat, millet, teosinte, and wild rice)	0.02
Celery	0.03
Clover	0.03
Collards	0.05
Cowpea hay	0.03
Cucumbers	0.1
Eggplant	0.05
Eggs	0.03
Endive (escarole)	0.05
Fats and oils (animal feed)	0.3
Figs	0.05
Fish	* 0.3
Forage, fodder, and straw of cereal grains (except those of buckwheat, millet, teosinte, and wild rice)	0.03
Grapefruit	0.02
Hay	0.03
Horse radish	0.1
Kale	0.05
Kohlrabi	0.05
Legume vegetables (except guar, jackbeans, lablab beans, and lentils)	0.05
Lemons	0.02
Lespedeza	0.03
Lettuce	0.03
Limes	0.02
Mangoes	0.03
Melons	0.1
Milk	* 0.3
Mustard greens	0.05
Oranges	0.02
Parsnips	0.1
Peas, hay	0.03
Peaches	0.02
Peanuts	0.05
Peanut hay	0.03
Peppers	0.05
Pimentos	0.05
Pineapple	0.03
Pome fruits (except crabapples and loquats)	0.03
Potatoes	0.1
Radishes	0.1
Radish tops	0.03
Rutabagas	0.1
Salsify roots	0.1
Salsify tops	0.05
Small fruits and berries	0.05
Soybean hay	0.03
Spinach	0.05
Squash	0.1
Stone fruits (except Chickasaw, Damson, and Japanese plums, and peaches)	0.03
Sugarbeet pulp (animal feed)	0.1
Sweet potatoes	0.1
Swiss chard	0.05
Tangerines	0.02
Tomatoes	0.05
Turnips	0.1
Turnip tops	0.05

\* Edible portion.

\* Fat basis.

The following action levels are for residues of chlordane, including heptachlor and its epoxide, *cis* and *trans* chlordane, *cis* and *trans* nonachlor, oxychlordane (octachlor epoxide), *alpha*, *beta*, and *gamma* chlordene, and chlordene.

TABLE II—CHLORDANE

Commodities	Action level (parts per million)
Animal fat, rendered	0.3
Animal feed, processed	0.1
Asparagus	0.1
Bananas	0.1
Beans	0.1
Beets (with or without tops)	0.1
Beet greens	0.1
Brassica (cole) leafy vegetables (except broccoli raab, Chinese mustard cabbage, and rape greens)	0.1
Carrots	0.1
Celery	0.1
Citrus fruits	0.1
Corn	0.1
Cucumbers	0.1
Eggplant	0.1
Fish	* 0.3
Lettuce	0.1
Melons	0.1
Okra	0.1
Onions	0.1
Papayas	0.1
Parsnips	0.1
Peanuts	0.1
Peas	0.1
Peppers	0.1
Pineapple	0.1
Pome fruits (except crabapples and loquats)	0.1
Potatoes	0.1
Radishes (with or without tops)	0.1
Radish tops	0.1
Rutabagas (with or without tops)	0.1
Rutabaga tops	0.1
Small fruits and berries (except cranberries, currants, elderberries, gooseberries, and olive berries)	0.1
Spinach	0.1
Squash	0.1
Stone fruits (except Chickasaw, Damson, and Japanese plums)	0.1
Sweet potatoes	0.1
Swiss chard	0.1
Tomatoes	0.1
Turnips (with or without tops)	0.1
Turnip greens	0.1

\* Edible portion.

The following action levels are for residues of the pesticides DDT, TDE, and DDE individually or in combination.

TABLE III.—DDT, TDE, AND DDE

Commodities	Action level (parts per million)
Animal feed processed	0.5
Artichokes	0.5
Asparagus	0.5
Avocados	0.2
Beets (roots and tops)	0.2
Brassica (cole) leafy vegetables (except broccoli raab, Chinese mustard cabbage, and rape greens)	0.5
Carrots	3
Cereal grains (except buckwheat, fresh sweet-corn, millet, popcorn, teosinte, and wild rice)	0.5
Celery	0.5
Citrus fruits	0.1
Cocoa beans	†
Corn, fresh sweet	0.1
Cottonseed	0.1
Cucumbers	0.1
Eggplant	0.1
Eggs	0.5
Endive (escarole)	0.5
Fish	* 0.5
Grapes	0.05
Guavas	0.2
Hay	0.5
Hops	0.1
Legume vegetables (except guar, jackbeans, lablab beans, and lentils)	0.2

TABLE III.—DDT, TDE, AND DDE—Continued

Commodities	Action level (parts per million)
Lettuce.....	0.5
Mangoes.....	0.2
Melons.....	0.1
Milk.....	1.25
Mushrooms.....	0.5
Okra.....	0.2
Onions (dry bulb).....	0.2
Papayas.....	0.2
Parasols (roots and tops).....	0.2
Peanuts.....	0.2
Peppermint hay.....	0.5
Peppermint oil.....	1
Peppers.....	0.1
Pineapples.....	0.2
Pome fruits (except crabapples and loquats).....	0.1
Potatoes.....	1
Radishes (roots and tops).....	0.2
Rutabagas (roots and tops).....	0.2
Small fruits and berries (except elderberries, grapes, and olallie berries).....	0.1
Soybean oil (crude).....	1
Spearmint hay.....	0.5
Spearmint oil.....	1
Spinach.....	0.5
Squash.....	0.1
Stone fruits (except Chickasaw, Damson, and Japanese plums).....	0.2
Sweet potatoes.....	1
Swiss chard.....	0.5
Tomatoes.....	0.05
Tomato pomace.....	0.5
Turnips (roots and tops).....	0.2

1 Edible portion.

2 Fat basis.

FDA's acceptance of EPA's recommended action levels to replace the zero tolerances that were revoked for aldrin and dieldrin also necessitated amending Attachment A of Compliance Policy Guide 7141.01. This Attachment specifies the enforcement levels FDA uses for pesticides that have EPA tolerances established at zero. The enforcement levels for aldrin and dieldrin have been deleted from Attachment A.

Copies of the EPA correspondence recommending the new and revised action levels of revised Attachments A, B.1, B.3, and B.5 of Compliance Policy Guide 7141.01, and the memorandum to FDA Field Offices notifying them of the establishment of the action levels are on file in the Dockets Management Branch (address above) under the docket number found in brackets in the heading of this document.

Interested persons may on or before July 13, 1987 submit to the Dockets Management Branch (address above) written comments, data, and information regarding these action levels. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Dated: May 5, 1987.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 87-10853 Filed 5-12-87; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 87M-0138]

### Carl Zeiss, Inc.; Premarket Approval of Zeiss Visulas ND: YAG Ophthalmic Laser for Iridectomy

AGENCY: Food and Drug Administration.

ACTION: Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing its approval of the supplemental application by Carl Zeiss, Inc., for premarket approval, under the Medical Device Amendments of 1976, of the Zeiss Visulas Nd: YAG Ophthalmic Laser for performing an iridectomy (hole in the iris). After reviewing the recommendation of the Ophthalmic Devices Panel, FDA's Center for Devices and Radiological Health (CDRH) notified the applicant of the approval of the application.

**DATE:** Petitions for administrative review by June 12, 1987.

**ADDRESS:** Written requests for copies of the summary of safety and effectiveness data and petitions for administrative review to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** Philip J. Phillips, Center for Devices and Radiological Health (HFZ-460), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-8221.

**SUPPLEMENTARY INFORMATION:** On January 12, 1987, Carl Zeiss, Inc., Thornwood, NY 10594, submitted to CDRH a supplemental application for premarket approval of the Zeiss Visuals Nd: YAG Ophthalmic Laser. The Zeiss Visuals Nd: YAG Ophthalmic Laser is a neodymium:yttrium-aluminum-garnet (Nd:YAG) ophthalmic laser that is indicated for performing an iridectomy (hole in the iris).

On February 26, 1987, the Ophthalmic Devices Panel, an FDA advisory committee, reviewed and recommended approval of the application. On March 31, 1987, CDRH approved the application by a letter to the applicant from the Director of the Office of Device Evaluation, CDRH.

A summary of the safety and effectiveness data on which CDRH based its approval is on file in the Dockets Management Branch (address

above) and is available from that office upon written request. Requests should be identified with the name of the device and the docket number found in brackets in the heading of this document.

A copy of all approved labeling is available for public inspection at CDRH—contact Philip J. Phillips (HFZ-460), address above.

### Opportunity For Administrative Review

Section 515(d)(3) of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. 360e(d)(3)) authorizes any interested person to petition, under section 515(g) of the act (21 U.S.C. 360e(g)), for administrative review of CDRH's decision to approve this application. A petitioner may request either a formal hearing under Part 12 (21 CFR Part 12) of FDA's administrative practices and procedures regulations or a review of the application and CDRH's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration under § 10.33(b) (21 CFR 10.33(b)). A petitioner shall identify the form of review requested (hearing or independent advisory committee) and shall submit with the petition supporting data and information showing that there is a genuine and substantial issue of material fact for resolution through administrative review. After reviewing the petition, FDA will decide whether to grant or deny the petition and will publish a notice of its decision in the **Federal Register**. If FDA grants the petition, the notice will state the issue to be reviewed, the form of review to be used, the persons who may participate in the review, the time and place where the review will occur, and other details.

Petitioner may, at any time on or before June 12, 1987, file with the Docket Management Branch (address above) two copies of each petition and supporting data and information, identified with the name of the device and the docket number found in brackets in the heading of this document. Received petitions may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (secs. 515(d), 520(h), 90 Stat. 554-555, 571 (21 U.S.C. 360e(d), 360j(h))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Devices and Radiological Health (21 CFR 5.53).

Dated: May 6, 1987.  
**James S. Benson,**  
*Acting Director, Center for Devices and  
 Radiological Health.*  
 [FR Doc. 87-10852 Filed 5-12-87; 8:45 am]  
 BILLING CODE 4160-01-M

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[CA-060-07-4212-17; CA-060-5-448]

#### California: Emergency Area Closure; San Diego County, CA

The following order, affecting Lot 4, Section 22, T. 10S., R. 4W., SBM., was issued on May 4, 1987.

I have determined that current use of this area is causing environmental degradation and is a serious threat to public health. This problem is the result of a number of people living in unauthorized sub-standard housing without sanitary facilities or a potable water supply.

In order to rectify this situation, I hereby order the above captioned public land closed to entry pursuant to 43 CFR 8364.1. Persons exempt from this order shall include those persons engaged in retrieving personal property from the site, or those with other specific authorization. Any person who knowingly and willfully violates this closure may be subject to \$1000 fine and/or one year imprisonment.

This order shall remain in effect until further notice.

Dated: May 4, 1987.  
**Leslie Cone,**  
*Area Manager.*  
 [FR Doc. 87-10887 Filed 5-12-87; 8:45 am]  
 BILLING CODE 4310-40-M

[AK-967-4213-15; A-060995]

#### Alaska; Notice for Publication

A portion of Japonski Island near Sitka, Alaska is being patented to the State of Alaska for the Mount Edgecumbe School Facility. In accordance with Public Law 98-396 of August 22, 1984, notice is hereby given of the lands to be retained by the Alaska Area Native Health Service on Japonski Island near Sitka, Alaska.

Lots 3 through 7, 9, 10 and 11, U.S. Survey No. 1496, Alaska, situated on Japonski Island near Sitka, Alaska.

Containing 29.94 acres, as shown on the plant of survey filed December 11, 1985.

Inquiries should be directed to the Bureau of Land Management, Alaska State Office, 701 C Street, Box 13, Attn:

Terry R. Hassett, Anchorage, Alaska 99513.

**Terry R. Hassett,**  
*Chief, Branch of KCS Adjudication.*  
 [FR Doc. 87-10865 Filed 5-12-87; 8:45 am]  
 BILLING CODE 4310-JA-M

[NM-030-07-4212-14; NM 64743]

#### Realty Action; Sierra County, NM

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of realty action.

**SUMMARY:** The following described parcel of public land has been examined and found suitable for direct sale under section 203 of the Federal Land Policy and Management Act of 1976 at not less than the appraised fair market value of \$200 per acre. The land will not be offered for sale until July 13, 1987.

T. 12 S., R. 4 W., NMPM,  
 Sec. 17, S $\frac{1}{2}$ W $\frac{1}{4}$ SW $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ ,  
 Containing approximately 30 acres.

The lands are proposed to be offered to the City of Truth or Consequences, New Mexico. The City plans to use the land to operate a sanitary landfill. The sale is not in conflict with the Bureau's planning system, and the land is not critical to any resource program and has been found suitable for use as a sanitary landfill. It has been determined that sale of this parcel of land to the City of Truth or Consequences will serve important public objectives. The patent, when issued, will be subject to all valid and existing rights and will contain the following reservations:

1. LC0954809—Right of Way—New Mexico State Highway Department.  
 2. A right-of-way thereon for ditches and canals constructed by the authority of the United States Act of August 30, 1890 (26 Stat. 391; 43 U.S.C. 945).

3. All mineral deposits in the land so patented. Such minerals shall be subject to the right to explore, prospect for, mine and remove under applicable law and such regulations as the Secretary may prescribe (Federal Land Policy and Management Act of 1976, 90 Stat. 2757; 43 U.S.C. 1719).

4. All the geothermal steam and associated geothermal resources as to land so patented, and to it, or persons authorized by it, the right to prospect for, mine and remove such deposits upon compliance with the conditions and subject to the provisions and limitations of the Act of December 24, 1970 (84 Stat. 1566).

**DATE:** Comments should be submitted on or before June 29, 1987.

**ADDRESSES:** Interested parties may submit comments to the Las Cruces

District Manager, Bureau of Land Management, 1800 Marquess Street, Las Cruces, New Mexico 88005.

**FOR FURTHER INFORMATION CONTACT:**  
 P. Robert Alexander, Area Manager,  
 White Sands Resource Area at 505-525-8228 (FTS 571-8351).

#### SUPPLEMENTARY INFORMATION:

Publication of this notice in the Federal Register segregates the public land from the operation of the public land laws and the mining laws. The segregative effect will end upon issuance of a patent or 270 days from the date of the publication, whichever occurs first.

Objections will be reviewed by the BLM State Director, who may sustain, vacate, or modify this realty action. In the absence of any objections, this realty action will become the final determination of the Department of the Interior.

**H. James Fox,**  
*District Manager.*  
 [FR Doc. 87-10867 Filed 5-12-87; 8:45 am]  
 BILLING CODE 4310-FB-M

#### Realty Action; in Jackson County, OR

The following described land is suitable for sale under section 203 (and 209) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1713 (and 1719), at no less than the appraised fair market value.

**Willamette Meridian:**  
 T. 34 S., R. 1 W., Sec. 17, Lot 1,  
 Jackson County, Oregon.

The above described land is hereby segregated from appropriation under the public land laws, including the mining laws, but not from sale under the above cited statute.

No significant resource values will be affected by this disposal. The sale is consistent with BLM'S planning for the land involved and the public interest will be served by offering this land for sale.

Direct sale procedures are being used since a competitive sale is not appropriate and the public interest would best be served by the direct sale because it would resolve a nonwillful unauthorized occupancy. Direct sale would recognize the existing improvement and avoid any unnecessary hardship on the owner. The parcel identified by Serial No. OR 41039 is being offered to Wesely and Helene Kercher using direct sale procedures authorized under 43 CFR 2711.3-3. The land will be sold at fair market value to Wesely and Helene Kercher without competitive bidding. The prospective

purchaser is required to render a minimum deposit of twenty percent (20%) of the purchase price sixty (60) days after establishment of the value and the balance within 180 days of the sale date. If the deposit is not submitted or the full purchase price not rendered within 180 days of the sale date, the preference right is cancelled, the deposit will be forfeited, and the parcel will not be sold.

#### Terms and Conditions of the Sale

The terms, conditions, and reservations applicable to the sale are as follows:

1. The United States reserves all right to oil and gas.

2. The remaining mineral interests being offered for conveyance have no known mineral value. The sale will also constitute an application for conveyance of the remaining mineral estate in accordance with Section 209 of the Federal Land Policy and Management Act, 43 U.S.C. 1719. The purchasers must include with their bid deposit a non refundable \$50.00 filing fee for the conveyance of the mineral estate.

3. Rights-of-way for ditches and canals will be reserved to the United States under 43 U.S.C. 945.

4. Patents will be issued subject to all valid existing rights and reservations of records.

5. The BLM may accept or reject any and all offers, or withdraw any land or interest in land from sale if, in the opinion of the authorized officer, consummation of the sale would not be fully consistent with the Federal Land Policy and Management Act or other applicable laws.

#### Comments

For a period of 45 days from the date of publication of this notice in the **Federal Register**, interested parties may submit comments to the District Manager, Bureau of Land Management, Medford District. Objections will be reviewed by the State Director who may sustain, vacate, or modify this realty action. In the absence of any objections, this realty action will become the final determination of the Department of the Interior.

Dated: April 30, 1987.

James P. Clason,

Acting District Manager.

[FR Doc. 87-10901 Filed 5-12-87; 8:45 am]

BILLING CODE 4310-33-M

#### Office of Surface Mining Reclamation and Enforcement

##### Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comments and suggestions on the requirement should be made within 30 days directly to the Bureau clearance office and to the Office of Management and Budget Interior Department Desk Officer, Washington, DC 20503, telephone 202-395-7340.

*Title:* Exemption for Coal Extraction Incidental to Extraction of other Minerals—30 CFR 702.

*Abstract:* This part implements the requirements in section 701 (28), Pub. L. 95-87 which requires the regulatory authority to make a determination of exemption to the Act of operators extracting less than 16% tonnage of coal incidental to other minerals. This information will be used by the regulatory authority to make that determination.

*Bureau form number:* None.

*Frequency:* Every 4 Years.

*Description of respondents:* Coal Mining Operators.

*Annual responses:* 100.

*Annual burden hours:* 500.

*Bureau clearance officer:* Darlene Grose-Boyd (202) 343-5447.

Dated: April 30, 1987.

Carson W. Culp,

Assistant Director, Budget and Administration.

[FR Doc. 87-10903 Filed 5-12-87; 8:45 am]

BILLING CODE 4310-05-M

#### INTERNATIONAL TRADE COMMISSION

##### Agency Form Submitted for OMB Review

**AGENCY:** United States International Trade Commission.

**ACTION:** In accordance with the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Commission has submitted a proposal for the collection of information to the

Office of Management and Budget for review.

**Purpose of Information Collection:** The proposed information collection is for use by the Commission in connection with investigation No. 332-229, U.S. Global Competitiveness: Textile Mill Industry, Instituted under the authority of section 332(g) of the Tariff Act of 1930 (19 U.S.C. 1332).

##### SUMMARY OF PROPOSAL:

(1) Number of forms submitted: Two.

(2) Title of form: U.S. Global Competitiveness: Textile Mill Industry—Questionnaires for U.S. Producers and Purchasers.

(3) Type of request: New.

(4) Frequency of use: Nonrecurring.

(5) Description of respondents: Firms which produce or purchase textile mill products.

(6) Estimated number of respondents: 225.

(7) Estimated total number of hours to complete the forms: 9,000.

(8) Information obtained from the form that qualifies as confidential business information will be so treated by the Commission and not disclosed in a manner that would reveal the individual operations of a firm.

**Additional Information or Comment:** Copies of the proposed form and supporting documents may be obtained from Joseph Williams, (USITC tel. no. 202-523-5702). Comments about the proposal should be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Attention: Francine Picoult, Desk Officer for U.S. International Trade Commission. Any comments should be specific, indicating which part of the questionnaire or study plan is objectionable, describing the problem in detail, and including specific suggested revisions or language changes.

**Submission of Comments:** Comments should be submitted to OMB within two weeks of the date this notice appears in the **Federal Register**. If you are unable to submit them promptly you should advise OMB within the two week period of your intent to comment on the proposal. Ms Picoult's telephone number is 202-359-7340. Copies of any comments should be provided to Charles Ervin (United States International Trade Commission, 701 E Street, NW., Washington DC 20436).

Hearing impaired individuals are advised that information on this matter can be obtained by contacting our TDD terminal on (202) 724-0002.

Issued: May 8, 1987.

By order of the Commission.

Kenneth R. Mason,  
Secretary.

[FR Doc. 87-10923 Filed 5-12-87; 8:45 am]

BILLING CODE 7020-02-N

[Investigation No. 337-TA-259]

**Certain Battery-Powered Smoke Detectors; Termination of Investigation as to Two Respondents on the Basis of Settlement Agreements**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Nonreview of two initial determinations granting joint motions to terminate the investigation as to two respondents on the basis of settlement agreements.

**SUMMARY:** On March 11, 1987, complainants Pittway Corporation and BRK/Colorado Inc. and respondent Gateway Scientific, Inc. (Gateway) filed a joint motion to terminate this investigation as to Gateway on the basis of a settlement agreement. On March 24, 1987, complainants and respondent Pyrotec, Inc. filed a similar motion. On April 7, 1987, the presiding administrative law judge issued two initial determinations (IDs) granting the joint motions to terminate the investigation. The Commission determined not to review the IDs.

**FOR FURTHER INFORMATION CONTACT:** Jean H. Jackson Esq., Office of the General Counsel, U.S. International Trade Commission, Washington, DC 20436, telephone 202-523-1693.

**SUPPLEMENTARY INFORMATION:** This action is taken under the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and Commission rule 210.53 (19 CFR 210.53).

Copies of the IDs and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington DC 20436, telephone 202-523-0161.

Hearing-impaired individuals are advised that information on this matter can be obtained by contracting the Commission's TDD terminal on 202-724-002

Issued: May 4, 1987.

By order of the Commission.

Kenneth R. Mason,  
Secretary.

[FR Doc. 87-10925 Filed 5-12-87; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-242]

**Certain Dynamic Random Access Memories, Components Thereof, and Products Containing Same; Commission Decision To Review and Remand Initial Determination to the Administrative Law Judge**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Review and remand of initial determination.

**SUMMARY:** The Commission has determined to review and remand to the presiding administrative law judge (ALJ) an initial determination (ID) terminating a portion of the above-captioned investigation as to respondents Hitachi, Ltd. and Hitachi American, Ltd. (collectively referred to as Hitachi).

**FOR FURTHER INFORMATION CONTACT:** Marcia H. Sundeen, Esq., Office of the General Counsel, U.S. International Trade Commission, 701 E Street NW., Washington, DC 20436, telephone 202-523-0480.

**SUPPLEMENTARY INFORMATION:** On March 12, 1986, the Commission instituted this investigation to determine whether there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337 and 19 U.S.C. 1337a) in the unlawful importation into and sale in the United States of certain dynamic random access memories (DRAMs) by reason of alleged infringement of ten U.S. patents owned by complainant Texas Instruments Incorporated (TI). TI alleged, *inter alia*, that DRAMs imported and sold by Hitachi infringed certain claims of U.S. Letters Patent 4,543,500 (the '500 patent), U.S. Letters Patent 4,533,843 (the '843 patent), and U.S. Letters Patent 4,495,376 (the '376 patent), all owned by TI.

On March 20, 1987, respondent Hitachi filed a motion (Motion No. 242-472) pursuant to Commission rule 210.51(a) requesting termination of the investigation as to Hitachi. Hitachi argued that it should be terminated from the investigation because it is impliedly licensed under the '500 and '843 patents and that the evidence does not establish that Hitachi's DRAMs have a tendency to injure the domestic industry because Hitachi has discontinued making and selling the only DRAMs that TI charged with infringement of the '376 patent. On April 2, 1987, the presiding ALJ issued an ID granting Hitachi's motion in part on the basis that Hitachi is impliedly licensed under the '500 and '843 patents. The ALJ denied Hitachi's motion with respect to the '376 patent. Complainant TI and the Commission investigative attorneys filed petitions for review of

the ID. Respondent Hitachi filed a reply to the petitions. No government agency comments were received.

Copies of the nonconfidential version of the ALJ's ID, the Commission's Action and Order, and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, DC 20436, telephone 202-523-0161. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-523-0002.

Issued: May 5, 1987.

By order of the Commission.

Kenneth R. Mason,  
Secretary.

[FR Doc. 87-10926 Filed 5-12-87; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-255]

**Certain Garment Hangers; Commission Determination Not To Review Initial Determination Finding Respondents in Default**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Nonreview of initial determination (ID) finding respondents in default and imposing procedural sanctions.

**SUMMARY:** Notice is hereby given that the Commission has determined not to review the presiding administrative law judge's (ALJ's) ID finding respondents Pasargarda and Hangers Unlimited (Milwaukee) in default in the above-captioned investigation.

**FOR FURTHER INFORMATION CONTACT:** Charles H. Nalls, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-1626.

**SUPPLEMENTARY INFORMATION:** On March 5, 1987, the ALJ ordered respondents Pasargarda and Hangers Unlimited (Milwaukee) to show cause why each should be half in default for failure to properly respond to the complaint and notice of investigation (Orders Nos. 29 and 31). Neither respondent replied to its respective show cause order.

On April 7, 1987, the ALJ issued an ID (Order No. 40) finding respondents Pasargarda and Hangers Unlimited (Milwaukee) in default pursuant to Commission rule 210.25 (19 CFR 210.25). The ALJ ruled that the respondents had waived: (1) Their right to appear in the

investigation; (2) their right to be served with documents by any party; and (3) their right to contest the allegations at issue. No petitions for review of the ID were received nor were any agency comments received.

Copies of the ID and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, DC 20436, telephone 202-523-0161. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-724-0002.

Issued: May 6, 1987.

Ordered of the Commission.

**Kenneth R. Mason,**  
Secretary.

[FR Doc. 87-10927 Filed 5-12-87; 8:45 am]

BILLING CODE 7020-02-M

[Investigations Nos 701-TA-285, and 286 (Final)]

#### **Industrial Phosphoric Acid From Belgium and Israel**

**AGENCY:** United States International Trade Commission.

**ACTION:** Schedule for the subject investigation.

**FOR FURTHER INFORMATION CONTACT:** Ilene Hersher (202-523-4616), Office of Investigations, U.S. International Trade Commission, 701 E Street NW., Washington, DC 20436. Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal on 202-724-0002. Information may also be obtained via electronic mail by assessing the Office of Investigations' remote bulletin board system for personal computers at 202-523-0103. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-523-0161.

**SUPPLEMENTARY INFORMATION:** Effective February 5, 1987, the Commission instituted the subject investigations and gave notice that a schedule for their conduct would be announced at a later date (52 FR 6631, March 4, 1987). Subsequently, the Department of Commerce extended the date for its final determinations in the investigations from April 14, 1987, to June 29, 1987 (52 FR 5324, February 20, 1987). The Commission, therefore, is

establishing its schedule in the investigations to conform with Commerce's new schedule.

The Commission's schedule for the investigations is as follows: A public version of the prehearing staff report will be placed on the public record on June 17, 1987; requests to appear at the hearing must be filed with the Secretary of the Commission not later than June 29, 1987; the prehearing conference will be held in room 117 of the U.S. International Trade Commission Building at 9:30 a.m. on June 30, 1987; the deadline for filing prehearing briefs is June 30, 1987; the hearing will be held in room 331 of the U.S. International Trade Commission Building at 9:30 a.m. on July 7, 1987; the deadline for filing all other written submissions, including posthearing briefs, is July 14, 1987; and the Commission will make its final injury determinations by August 12, 1987.

For further information concerning the conduct of these investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, Part 207, subparts A and C (19 CFR Part 207), and Part 201 Subpart A through E (19 CFR Part 201).

**Authority:** These investigations are being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 207.20 of the Commission's rules (19 CFR 207.20).

By order of the Commission.

**Kenneth R. Mason,**  
Secretary.

Issued: May 4, 1987.

[FR Doc. 87-10928 Filed 5-12-87; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-244]

#### **Certain Insulated Security Chests; Initial Determination Terminating Respondent on the Basis of Settlement Agreement**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice is hereby given that the Commission has received an initial determination from the presiding officer in the above-captioned investigation terminating the following respondent on the basis of a settlement agreement: EP Industrial Co., Ltd.

**SUPPLEMENTARY INFORMATION:** This investigation is being conducted pursuant to section 337 of the Tariff Act of 1930 (19 U.S.C. 1337). Under the Commission's rules, the presiding officer's initial determination will become the determination of the

Commission thirty (30) days after the date if its service upon the parties, unless the Commission orders review of the initial determination. The initial determination in this matter was served upon the parties on May 7, 1987.

Copies of the initial determination, the settlement agreement, and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, DC 20436, telephone 202-523-0161. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-724-0002.

#### **Written Comments**

Interested persons may file written comments with the Commission concerning termination of the aforementioned respondent. The original and 14 copies of all such comments must be filed with the Secretary to the Commission, 701 E Street NW., Washington, DC 20436, no later than 10 days after publication of this notice in the **Federal Register**. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment. Such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why confidential treatment should be granted. The Commission will either accept the submission in confidence or return it.

**FOR FURTHER INFORMATION CONTACT:** Ruby J. Dionne, Office of the Secretary, U.S. International Trade Commission, telephone 202-523-0176.

Issued: May 7, 1987.

By order of the Commission.

**Kenneth R. Mason,**  
Secretary.

[FR Doc. 87-10929 Filed 5-12-87; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-267]

#### **Certain Minoxidil Power, Salts and Compositions for Use in Hair Treatment; Investigation**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Institution of investigation pursuant to 19 U.S.C. 1337.

**SUMMARY:** Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on April 7, 1987, pursuant to section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), on behalf of the Upjohn Company, Kalamazoo, Michigan 49001. A supplement to the complaint as filed on April 28, 1987. The complaint as supplemented, alleges unfair methods of competition and unfair acts in the importation of certain minoxidil powder, minoxidil salts and compositions and concentrates containing minoxidil or its salts into the United States, and in their sale, by reason of alleged direct, contributory and induced infringement of (1) all nine claims of U.S. Letters Patent 4,139,619; and (2) at least claims 1, 8, 9, 11, 13, and 14 of U.S. Letters Patent 4,596,812. The complaint further alleges that the effect or tendency of the unfair methods of competition and unfair acts is to destroy or substantially injure as industry, efficiently and economically operated, in the United States, or prevent the establishment of such an industry in the United States.

The complainant requests that the Commission institute an investigation and, after a full investigation, issue a permanent exclusion order and permanent cease and desist orders.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey L. Gertler, Esq., and Cheri M. Taylor, Esq., office of Unfair Import Investigations, U.S. International Trade Commission, telephone 202-523-0115 and 202-523-0440, respectively.

**Authority:** The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930 and in §210.12 of the Commission's Rules of Practice and Procedure (19 CFR 210.12).

#### Scope of Investigation

Having considered the complaint, the U.S. International Trade Commission, on May 7, 1987, ordered that—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, an investigation be instituted to determine whether there is a violation of subsection (a) of section 337 in the unlawful importation of certain minoxidil powder, salts and compositions for use in hair treatment into the United States, or in their sale, by reason of alleged direct, contributory and induced infringement of (1) all nine claims of U.S. Letters patent 4,139,619, and (2) claims 1, 8, 9, 11, 13, and 14 of U.S. Letters Patent 4,596,812, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, and to prevent the establishment of an industry in the United States;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: The Upjohn Company, Kalamazoo, Michigan 49001.

(b) The respondents are the following companies, alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

ACIC Limited, 66 ST. Clair Avenue, East, Suite 304, Toronto, Ontario, Canada M4T 1M5

Alchymar, 20020 Ceriano, Laghette, Via Delle Industria 6, Milan, Italy

Bernhoff Laboratories, Inc., P.O. Box 4526, CH-6304 Zug, Switzerland

Farmos Group, P.O. Box 425, SF-20101, Turku 10, Finland

Hair-Gro, APDO. Postal No. 176, Playas De Tijuana, Mexico.

Hauptmann Institute, Heitzinger

Hauptstr. 37, A-1130 Vienna, Austria  
Kemyos Bio Medical Research S.r.l., 54 Via Binasco, Casarile 20080, Milan, Italy

Ocean Chemicals, P.O. Box 86622, North Vancouver B. C., Canada V7L 4LZ

Societa Italiana Chimici, Via Luigi Pulci 25-27, Rome 00162, Italy

TOPCHEM s.r.l., Viale Andrea Dore 17, Milan 20124, Italy

Brainered Chemical Company, Inc., P.O. Box 47001D, 6507 East 42nd Street, Tulsa, Oklahoma 74147

Chem Tri State, Inc., 1933 No. Marianna, Los Angeles, California 90023

Future Marketing & Associates, Inc., 6736 Eton Avenue, Canoga Park, California 91303

Health International, Suite 242, 19528 Ventura Boulevard, Tarzana, California 91356

Life Essentials, Suite 550, 8306 Wilshire Boulevard, Beverly Hills, California 90211

Mastey Distributors, Inc., 24645 W. Warren, Dearborn, Michigan 48127

Professional Compounding Centers of America, Inc., Suite 620 10925 Kinghurst, Houston, Texas 77099

Riahom Corporation, 900 E. Executive, Indiantown Road, Jupiter, Florida 33458

S.S.T. Corporation, 1373 Broad Street, P.O. Box 1649, Clifton, New Jersey 07015

Tulsa Intertrade, Box 4461, Tulsa, Oklahoma 74159.

(c) Jeffrey L. Gertler, Esq., and Cheri M. Taylor, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 701 E Street NW., Room 125, Washington, DC 20436, shall be the attorneys for the Commission investigative staff party to this investigation; and

(3) For the investigation so instituted, Janet D. Saxon, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding administrative law judge.

Responses must be submitted by the named respondents in accordance with § 210.21 of the Commission's Rules of Practice and Procedure (19 CFR 210.21). Pursuant to §§ 201.16(d) and 210.21(a) of the rules (19 201.16(d) and 210.21(a)), such responses will be considered by the commission if received not later than 20 days after the date of service of the complaint. Extensions of time for submitting a response will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notices to the respondent to find the facts to be as alleged in the complaint and this notice and to enter both an initial determination and a final determination containing such findings.

The complaint except for any confidential business information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Room 156, Washington, DC 20436, telephone 202/523-0471. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-724-0002.

Issued: May 8, 1987.

By order of the Commission.

Kenneth R. Mason,  
Secretary.

[FR Doc. 87-10924 Filed 5-12-87; 8:45]

BILLING CODE 7020-02-M

#### INTERSTATE COMMERCE COMMISSION

[Docket No. AB-19 (Sub-131X)]

**The Baltimore & Ohio Railroad Co.  
Exemption Abandonment in  
Montgomery County, OH**

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Notice of exemption.

**SUMMARY:** The Interstate Commerce Commission exempts The Baltimore &

Ohio Railroad Company from the requirements of 49 U.S.C. 10903, *et seq.*, to abandon a 1.71-mile line of railroad in Montgomery County, OH, subject to standard employee protective conditions.

**DATES:** This exemption will be effective on June 12, 1987. Petitions to stay must be filed by May 28, 1987, and petitions for reconsideration must be filed by June 8, 1987.

**ADDRESS:** Send pleadings referring to Docket No. AB-19 (Sub-No. 131X) to:

(1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423  
(2) Petitioner's representatives:

Lawrence H. Richmond, Peter J. Shultz,  
100 North Charles Street, Baltimore,  
MD 21201

Patricia Vail, Charles M. Rosenberger,  
500 Water Street, Jacksonville, FL  
32202.

**FOR FURTHER INFORMATION CONTACT:**

Joseph H. Dettmar, (202) 275-7245

**SUPPLEMENTARY INFORMATION:**

Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to T.S. InfoSystems, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423, or call 289-4357 (DC Metropolitan area).

Decided: May 4, 1987.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons.

Noreta R. McGee,  
Secretary.

[FR Doc. 87-10966 Filed 5-12-87; 8:45 am]

BILLING CODE 7035-01-M

## DEPARTMENT OF JUSTICE

### Antitrust Division

#### Proposed Termination of Amended Final Judgment; EKCO/GLACO INC.

Notice is hereby given that EKCO/GLACO INC. ("EKCO") has filed with the United States District Court for the Northern District of California a motion to terminate the Amended Final Judgment in *United States v. EKCO/GLACO Inc.*, Civil Action No. 36584; and the Department of Justice ("Department"), in a stipulation also filed with the court, has consented to termination of the judgment, but has reserved the right to withdraw its consent pending receipt of public comments. The complaint in this case (filed on June 29, 1957) alleged that EKCO and its wholly owned subsidiaries had conspired to monopolize the reglazing of used

commercial baking pans throughout the United States. The Amended Final Judgment (entered on May 9, 1966) enjoined the defendant from dual pricing, deviating from published price lists except to meet competition, and selling at low prices which have the purpose or effect of eliminating a competitor.

The Department has filed with the court a memorandum setting forth the reasons why the Department believes that termination of the judgment would serve the public interest. Copies of the complaint and Amended Final Judgment, defendant's motion papers, the stipulation containing the Government's consent, the Department's memorandum, and all further papers filed with the court in connection with this motion will be available for inspection at Room 7233, Antitrust Division, Department of Justice, 10th Street and Pennsylvania Avenue, NW., Washington, DC 20530 (telephone: 202-633-2481), and at the Office of the Clerk of the United States District Court for the Northern District of California, Federal Building, 450 Golden Gate Avenue, San Francisco, California 94102. Copies of any of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Interested persons may submit comments regarding the proposed termination of the decree to the Department. Such comments must be received within the sixty day period established by court order, and will be filed with the court. Comments should be addressed to Gary R. Spratling, Chief, San Francisco Office, Antitrust Division, Department of Justice, 450 Golden Gate Avenue, Box 36046, San Francisco, CA 94102 (telephone: 415-556-6300).

Dated: May 4, 1987.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 87-10868 Filed 5-12-87; 8:45 am]

BILLING CODE 4410-01-M

### Drug Enforcement Administration

[Docket No. 86-71]

Charles D. Pearce, M.D., Louisville, KY;  
Hearing

Notice is hereby given that on August 20, 1986, the Drug Enforcement Administration, Department of Justice, issued to Charles E. Pearce, M.D. an Order to Show Cause as to why the Drug Enforcement Administration should not revoke his DEA Certificate of Registration, AP5441530 and any

pending applications for renewal of such registration.

Thirty days having elapsed since the said Order to Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held commencing at 9:30 a.m. on Tuesday, May 12, 1987, in Courtroom 9, First Floor, Jefferson Trial Courts, 600 West Jefferson Street, Louisville, Kentucky.

Dated: May 6, 1987.

John C. Lawn,

Administrator, Drug Enforcement Administration.

[FR Doc. 87-10920 Filed 5-12-87; 8:45 am]

BILLING CODE 4410-09-M

[Docket No. 86-78]

Clifton Orson Timanus, D.D.S.,  
Memphis, TN; Hearing

Notice is hereby given that on September 25, 1986, the Drug Enforcement Administration, Department of Justice, issued to Clifton Orson Timanus, D.D.S. an Order to Show Cause as to why the Drug Enforcement Administration should not deny his application for registration dated April 22, 1986.

Thirty days having elapsed since the said Order to Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held commencing at 9:30 a.m. on Wednesday, May 13, 1987, in Courtroom 9, First Floor, Jefferson Trial Courts, 600 West Jefferson Street, Louisville, Kentucky.

Dated: May 6, 1987.

John C. Lawn,

Administrator, Drug Enforcement Administration.

[FR Doc. 87-10921 Filed 5-12-87; 8:45 am]

BILLING CODE 4410-09-M

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 87-42]

NASA Advisory Council (NAC), Space and Earth Science Advisory Committee (SESAC); Meeting

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with Federal Advisory Committee Act, Pub. L. 92-463,

as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Space and Earth Science Advisory Committee.

Date and time: May 27, 1987, 9:30 a.m.-5:45 p.m., May 28, 1987, 8:30 a.m.-5:30 p.m., May 29, 1987, 8:30 a.m.-3:30 p.m.

**ADDRESS:** NASA Headquarters, Room 226A, 600 Independence Avenue, SW, Washington, DC 20546.

**FOR FURTHER INFORMATION CONTACT:** Dr. Jeffrey D. Rosenolhal, Code E, National Aeronautics and Space Administration, Washington, DC 20546 (202/453-1656).

**SUPPLEMENTARY INFORMATION:** The NAC Space and Earth Science Advisory Committee will meet to review the Office of Space Science and Applications (OSSA) prospective budget for 1989, augmentations and other initiatives for FY 1989, and program technical issues for New Start candidates. The Committee is chaired by Dr. Louis Lanzerotti and is composed of 32 members. The meeting will be closed Thursday, May 28, at 4:30 p.m. to allow for a discussion on membership. Such a discussion would invade the privacy of the individuals involved. Since this session will be concerned with matters listed in 5 U.S.C. 552b(c)(6), it has been determined that the meeting will be closed to the public for this period of time. The remainder of the meeting will be open to the public up to the seating capacity of the room (approximately 60).

Type of meeting: Open except for a closed session as noted in the agenda below.

Agenda: May 27, 1987:

9:30 a.m.—Introduction, Review of Agenda and Purpose of Meeting, Announcements, etc.

9:45 a.m.—Status of Office of Space Science and Applications (OSSA) Prospects for the FY 1989 Budget.

#### Review of New Start Candidates

12:45 p.m.—Introductory Remarks.  
1 p.m.—Advance X-Ray Astrophysics Facility.

2 p.m.—Comet Rendezvous-Asteroid Flyby.

3:15 p.m.—Round Table Discussion to Clarify Program Technical Issues for New Start Candidates.

4:15 p.m.—Subgroup Discussions.  
5:45 p.m.—Adjourn.

May 28, 1987:

8:30 a.m.—Continuation and Completion of Subgroups Discussions on New Starts.

#### Discussion by Division Directors of Augmentations and Other Initiatives for FY 1989

9:30 a.m.—Solar System Exploration.  
10:30 a.m.—Astrophysics.  
11:30 a.m.—Earth Science and Applications.

1:30 p.m.—Round Table Discussion with Division Directors on Augmentations and Other Initiatives.

2:30 p.m.—Subgroup Discussion of Augmentations and Other Initiatives.

4:30 p.m.—Closed Session.  
5:30 p.m.—Adjourn.

May 29, 1987:

8:30 a.m.—Reports from Subgroups on New Starts/Committee Discussion.

10:15 a.m.—Report from Subgroups on Augmentations and Other Initiatives/Committee Discussion.

11:15 a.m.—General Discussion/Formulations of Committee Recommendations.

1:30 p.m.—Completion of Formulation of Committee Recommendations/Presentations of Summary Recommendations/Discussion.

2:30 p.m.—Future Committee Activities.

3:30 p.m.—Adjourn.

Richard L. Daniels,  
Advisory Committee Management Officer,  
National Aeronautics and Space Administration.

May 7, 1987.

[FR Doc. 87-10886 Filed 5-12-87; 8:45 am]

BILLING CODE 7510-01-M

#### NATIONAL CREDIT UNION ADMINISTRATION

##### Agency Forms Submitted to the Office of Management and Budget for Clearance

The following package is being submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35).

**Subject:** Participating Credit Union (PCU) Sample, NCUA 5301-(3133-0001).

**Abstract:** Credit Union Monthly Survey provides financial data that serves as a basis for estimating consumer savings and credit, growth in assets, savings, investments and to monitor trends and developments at all U.S. credit unions. The information is also used for supervisory program planning, management and publication of industry statistics.

**Frequency:** Respondents provide financial information on a monthly basis.

**Burden:** The average time required to comply with this information collection is 15 minutes per submittal.

**Respondents:** A sample of federally insured credit unions.

**OMB Desk Officer:** Robert Fishman.

Copies of the above information collection clearance package may be obtained by calling the National Credit Union Administration, Administrative Office on (202) 357-1055.

Written comments and recommendations for the listed information collection should be sent directly to the OMB Desk Officer designated above at the following address: OMB Reports Management Branch, New Executive Office Building, Room 3208, Washington, DC 20503.

Dated: April 30, 1987.

Rebecca Baker,  
Acting Secretary of the NCUA Board.  
[FR Doc. 87-10869 Filed 5-12-87; 8:45 am]

BILLING CODE 7535-01-M

#### NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

##### Arts Education Research Center Project; Notification of Request for Qualifications Statement

**AGENCY:** National Endowment for the Arts.

**ACTION:** Notice of request for statement of qualifications.

**SUMMARY:** The Department of Education and the National Endowment for the Arts are planning jointly to fund a project on arts education research for public and private schools in kindergarten through twelfth grades. Statement of qualifications are requested from interested not-for-profit institutions of higher education. This notice sets forth a description of the project and necessary contents of a statement for qualifications.

**DATE:** Statement of qualifications must be submitted by June 14, 1987.

**ADDRESS:** Contracts Office, Room 217, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

**FOR FURTHER INFORMATION CONTACT:** William I. Hummel, Contract Specialist, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506 (202/682-5482).

**SUPPLEMENTARY INFORMATION:** Support will be provided for focused research efforts dealing with one or several of the following areas: Standards or goals for student achievement in the arts; determination of kinds of curricula that

should be used; how the arts should be taught; and, what kinds of student testing and evaluation and program evaluation should and do occur. The term "arts" in this context includes visual and design arts (e.g., painting, sculpture, crafts arts, printmaking, architecture and design), the media arts; and the performing arts, including music, dance, and theater. An awardee under this program will be known as a Center for Research on Learning and Teaching in the Arts. The initial award will be made by September 30, 1987. Funding may continue up to three years. The statement of qualifications should include a description of the institution, experience in art education research, and current staff qualifications. Attachments to the statement should include copies of papers, articles, and research reports prepared by the staff which are relevant to research in arts education, as well as two self addressed mailing labels. Closing date for submission of responses is June 14, 1987. Failure to submit a statement of qualifications does not preclude an institution from submitting a proposal in response to a solicitation for this project, in the event that such a solicitation occurs.

Peter J. Basso,

Deputy Chairman for Management, National Endowment for the Arts.

[FR Doc. 87-11066 Filed 5-12-87; 8:45 am]

BILLING CODE 7537-01-M

## NUCLEAR REGULATORY COMMISSION

[Docket No. 50-338]

### Virginia Electric and Power Co. and Old Dominion Electric Cooperative, North Anna Power Station, Unit 1; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission is considering the issuance of an exemption from the requirements of 10 CFR 50.46 to Virginia Electric and Power Company and Old Dominion Electric Cooperative (the licensee) for the North Anna Power Station, Unit No. 1, located in Louisa County, Virginia.

#### Environmental Assessment

##### Identification of Proposed Action and Need for Proposed Action

The licensee proposes to use two lead test assemblies in the North Anna facilities. These assemblies are clad with an advanced cladding material, a zirconium based alloy. Although the new zirconium based alloy is very similar in composition to "Zircalloy," it

is not clear that the new alloy falls within the scope of 10 CFR 50.46 which applies to "Zircalloy" clad fuel. Resolution of this question will involve a substantial effort in checking into the rulemaking record on which §50.46 was based. In the absence of such resolution, an exemption from the provision of §50.46 limiting its application to "Zircalloy" clad fuel is needed to permit authorization of the use of the new fuel. Test experience with a limited number of assemblies for design development purposes provides important data to determine whether new designs can provide performance improvement while maintaining a high standard of safety performance.

#### Environmental Impact of the Proposed Action

Operation with the new cladding will not be significantly affected. The composition of the zirconium based alloy is very similar to "Zircalloy" in all significant respects; moreover, the test assemblies are not located in the portions of the core expected to experience highest burnup and highest power density. The safety assessments performed by the licensee and the NRC staff demonstrate that performance of these assemblies in the event of a LOCA will be bounded by the performance previously calculated for the other zircalloy clad assemblies in the core, which was based on accepted ECCS evaluation models.

Further, the staff has concluded that use of two test assemblies containing the new alloy in the North Anna 1 reactor would conform to all current fuel design bases, would not change the existing reload design and safety analysis limits, and would satisfy the guidelines for lead test assemblies.

As a result, the use of the 2 lead test assemblies would not affect the probability or consequences of potential reactor accidents; nor does the proposed exemption otherwise affect radiological plant effluents. Therefore, the Commission concludes that there are no significant radiological impacts associated with the proposed exemption.

With regard to potential non-radiological impacts, the proposed exemption involves features located entirely within the restricted area as defined in 10 CFR Part 20. It does not affect non-radiological plant effluents and has no other significant non-radiological environmental impact associated with the proposed exemption.

#### Alternatives to the Proposed Action

Since we have concluded that the environmental effects of the proposed action are not significant, any alternatives with equal or greater environmental impacts need not be evaluated.

The principal alternative would be to deny the requested exemption. This would not reduce the environmental impact associated with the provisions of 50.46 limiting application of fuel assemblies to "Zircalloy" clad fuel and compliance with the rule would negate design development purposes which provide important data to determine whether new fuel assemblies with advanced cladding material (zirconium base alloy) can provide performance improvement while maintaining a high standard of safety performance.

#### Alternative Use of Resources

This action does not involve the use of resources not previously considered in the Final Environmental Statement (as amended) for the North Anna Power Station, Units No. 1 and No. 2.

#### Agencies and Persons Contacted

The NRC staff reviewed the licensee's request and did not consult other agencies or persons.

#### Finding of No Significant Impact

The Commission has determined not to prepare an environmental impact statement for the proposed exemption.

Based upon the foregoing environmental assessment, we conclude that the proposed action will not have a significant effect on the quality of the human environment.

For further details with respect to this action, see the licensee's application for using two lead test assemblies with advanced cladding material dated February 20, 1987, which is available for public inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, DC, and at the Board of Supervisors Office, Louisa County Courthouse, Louisa, Virginia 23093, and the Alderman Library, Manuscripts Department, University of Virginia, Charlottesville, Virginia 22901.

Dated at Bethesda, Maryland, this 7th day of May, 1987.

For the Nuclear Regulatory Commission.

Lester S. Rubenstein,

Director, Project Directorate II-2, Division of Reactor Projects-I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 87-10956 Filed 5-12-87; 8:45 am]

BILLING CODE 7590-01-M

**Advisory Committee on Reactor  
Safeguards Subcommittee on Nuclear  
Plant Chemistry; Meeting**

The ACRS Subcommittee on Nuclear Plant Chemistry will hold a meeting on May 19, 1987, Room 1046, 1717 H Street, NW., Washington, DC.

The entire meeting will be open to public attendance.

The agenda for subject meeting shall be as follows:

*Tuesday, May 19, 1987—1:00 P.M. until the conclusion of business*

The Subcommittee will review SRP section 6.5.2, "Containment Spray as a Fission Product Cleanup System," and SRP section 6.5.5, "Suppression Pools as Fission Product Cleanup Systems."

Oral statements may be presented by members of the public with concurrence of the Subcommittee Chairman; written statements will be accepted and made available to the Committee. Recordings will be permitted only during those portions of the meeting when a transcript is being kept, and questions may be asked only by members of the Subcommittee, its consultants, and Staff. Persons desiring to make oral statements should notify the ACRS staff members as far in advance as practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the Subcommittee, along with any of its consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

The Subcommittee will then hear presentations by and hold discussions with representatives of the NRC Staff, its consultants, and other interested persons regarding this review.

Further information regarding topics to be discussed, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the cognizant ACRS staff member, Mr. Herman Alderman (telephone 202/634-1414) between 8:15 a.m. and 5:00 p.m. Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., which may have occurred.

Dated: May 8, 1987.

Morton W. Libarkin,  
Assistant Executive Director for Project  
Review.

[FR Doc. 87-10960 Filed 5-12-87; 8:45 am]

BILLING CODE 7590-01-M

**Advisory Committee on Reactor  
Safeguards Subcommittee on  
Regulatory Policies and Practices;  
Meeting**

The ACRS Subcommittee on Regulatory Policies and Practices will hold a meeting on May 26, 1987, Room 1046, 1717 H Street, NW., Washington, DC.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

*Tuesday, May 26, 1987—8:30 a.m. until the conclusion of business*

The Subcommittee will continue its current review of the nuclear plant regulatory process.

Oral statements may be presented by members of the public with the concurrence of the Subcommittee Chairman; written statements will be accepted and made available to the Committee. Recordings will be permitted only during those portions of the meeting when a transcript is being kept, and questions may be asked only by members of the Subcommittee, its consultants, and Staff. Persons desiring to make oral statements should notify the ACRS staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the Subcommittee will exchange preliminary views regarding matters to be considered during the balance of the meeting.

The Subcommittee will then hold discussions with past and present representatives of the NRC regarding this review.

Further information regarding topics to be discussed, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the cognizant ACRS staff member, Mr. Gary Quittschreiber (telephone 202/634-3267) between 8:15 a.m. and 5:00 p.m. Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., which may have occurred.

Dated: May 7, 1987.

Morton W. Libarkin  
Assistant Executive Director of Project  
Review.

[FR Doc. 87-10961 Filed 5-12-87; 8:45 am]

BILLING CODE 7590-01-M

**SECURITIES AND EXCHANGE  
COMMISSION**

[Release No. 34-24430; File No. SR-CBOE-87-08]

**Self-Regulatory Organizations;  
Proposed Rule Change by the Chicago  
Board Options Exchange, Inc. Relating  
to Liability for Payment of Debts**

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on March 16, 1987, the Chicago Board Options Exchange, Incorporated filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Text of the Proposed Rule Change**

Additions are italicized; there are no deletions.

*Liability for Payment*

*Rule 2.23. A member that does not pay any dues, fees, assessments, charges, fines or other amounts due to the Exchange within 30 days after the same has become payable shall be reported to the Chairman of the Executive Committee, who may, after giving reasonable notice to the member of such arrearages, suspend the member until payment is made. Should payment not be made within 6 months after payment is due, a regular membership may be disposed of by the Exchange or a special membership may be disposed of or cancelled by the Exchange, in accordance with Rule 3.14(b). A person association with a member who fails to pay any fine or other amounts due to the Exchange within 30 days after such amount has become payable and after reasonable notice of such arrearages, may be suspended by the Chairman of the Executive Committee from associated with a member until payment is made.*

*Interpretations and Policies:*

*.01 Reasonable notice under Rule 2.23 shall include, but is not limited to, service on a member or associated person's address as it appears on the books and records of the Exchange*

either by (1) hand delivery or (2) deposit in the United States post office, postage prepaid via registered or certified mail.

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below and is set forth in sections (A), (B), and (C) below.

### (A) Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to assure that Exchange members and associated persons pay debts owed to the Exchange in a timely manner and to discipline those who fail to comply with the rule. The proposed change gives the Chairman of the Executive Committee the authority to suspend associated persons for violations of this rule. The suspension is only effective until the fine is paid.

The proposed rule change also clarifies the "reasonable notice" a member or associated person must be given of any debts owed to the Exchange.

The proposed rule change is consistent with the purposes of the Securities and Exchange Act of 1934 and, in particular, section 6(b)(5) thereof, in that the proposed rule change promotes just and equitable principles of trade.

### (B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that this proposed rule change will impose any burden on competition.

### (C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Comments were neither solicited nor received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the *Federal Register* or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and

publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submission should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by June 3, 1987.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Dated: May 6, 1987.

Jonathan G. Katz,  
Secretary.

[FR Doc. 87-10947 Filed 5-12-87; 8:45 am]

BILLING CODE 8010-01-M

## DEPARTMENT OF STATE

[Public Notice CM-8/1078]

### Integrated Services Digital Network (ISDN); Joint Working Party and Study Group C of the U.S. Organization for the International Telegraph and Telephone Consultative Committee (CCITT); Meeting

The Department of State announces that Integrated Services Digital Network (ISDN) Joint Working Party and Study Group C of the U.S. Organization for the International Telegraph and Telephone Consultative Committee (CCITT) will meet on June 9, 1987 at 9:30 a.m. in Room 1205, Department of State, 2201 C Street, NW., Washington, DC.

The proposed agenda will be:

1. Report on CCITT Study Group XI Working Parties Meeting, Phoenix, March 23-April 10, 1987.

2. Consideration of Contributions to the Study Group XVIII Meeting, Hamburg, June 29-July 17, 1987.

3. Consideration of other relevant contributions.

4. Other business.

Members of the general public may attend the meeting and join in the discussion, subject to the instructions of the Chairman. Admittance of public members will be limited to the seating available. In that regard, entrance to the Department of State building is controlled and entry will be facilitated if arrangements are made in advance of the meeting. Prior to the meeting, persons who plan to attend should so advise the office of Mr. Earl Barbely, State Department, Washington, DC; telephone (202) 653-6102. All attendees must use the C Street entrance to the building.

Dated: April 23, 1987.

Earl S. Barbely,

Director, Office of Technical Standards and Development; Chairman, U.S. CCITT National Committee.

[FR Doc. 87-10872 Filed 5-12-87; 8:45 am]

BILLING CODE 4710-07-M

[Public Notice 1010]

## Certain Foreign Passports Validity

Jordan is added to the list of countries which have entered into agreements with the Government of the United States whereby their passports are recognized as valid for the return of the bearer to the country of the foreign issuing authority for a period of at least six months beyond the expiration date specified in the passport. This notice amends Public Notice 954 of February 26, 1986 (51 FR 6853).

Dated: May 4, 1987.

Joan M. Clark,

Assistant Secretary for Consular Affairs.

[FR Doc. 87-10873 Filed 5-12-87; 8:45 am]

BILLING CODE 4710-06-M

## DEPARTMENT OF TRANSPORTATION

### Aviation Proceedings; Agreements Filed During the Week Ending May 1, 1987

The following agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. 408, 409, 412, and 414. Answers may be filed within 21 days of date of filing.

**Docket No. 44840 R-1—R-10**

*Parties:* Members of International Air Transport Association.

*Date Filed:* April 27, 1987.

*Subject:* Passenger Agency Conference Resolutions.

*Proposed Effective Date:* October 1, 1987.

**Docket No. 44853 R-1—R-3**

*Parties:* Members of International Air Transport Association.

*Date Filed:* May 1, 1987.

*Subject:* Filing Procedures for Proportional Fares.

*Proposed Effective Date:* May 15, 1987.

**Docket No. 44854 R-1—R-7**

*Parties:* Members of International Air Transport Association.

*Date Filed:* May 1, 1987.

*Subject:* TC31 North and Central Pacific Resolutions.

*Proposed Effective Date:* July 1, 1987; September 1, 1987.

Phyllis T. Kaylor,

Chief, Documentary Services Division.

[FR Doc. 87-10879 Filed 5-12-87; 8:45 am]

BILLING CODE 4910-62

**Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ended May 1, 1987**

The following applications for certificates of public convenience and necessity and foreign air carrier permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 et seq.). The due date for answers, conforming application, or motion to modify scope are set forth below for each application. Following the answer period DOT may process and the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

**Docket No. 44884**

*Date Filed:* April 28, 1987.

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* May 26, 1987.

*Description:* Application of Brian Thompson Air Service, pursuant to Section 401 of the Act and Subpart Q of the Regulations, applies for a certificate of public convenience and necessity for an indefinite term to perform scheduled interstate air transportation of persons, property of mail between the terminal

point Fairbanks, the intermediate points Ambler and Kobuk, and the terminal point Shungnak, Alaska.

**Docket No. 44850**

*Date Filed:* April 30, 1987.

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* May 28, 1987.

*Description:* Application of Trans World Airlines, Inc. pursuant to Section 401 of the Act and Subpart Q of the Regulations, applies for an amendment of its certificate of public convenience and necessity for Route 147 to authorize TWA to carry local passengers, property and mail on its London-Frankfurt flights authorized by such certificate during the off-peak season, namely, from October 29 through May 14 of each year, commencing October 29, 1987.

**Docket No. 44852**

*Date Filed:* May 1, 1987.

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* May 29, 1987.

*Description:* Application of Yutana Airlines pursuant to Section 401 of the Act and Subpart Q of the Regulations, applies for a certificate of public convenience and necessity for an indefinite term to perform scheduled interstate air transportation of persons, property of mail between the terminal point Fairbanks, and the terminal point Tanana, Alaska.

Phyllis T. Kaylor,

Chief, Documentary Services Division.

[FR Doc. 87-10880 Filed 5-12-87; 8:45 am]

BILLING CODE 4910-62-M

**[Order 87-5-17; Docket 44525]**

**MGM Grand Air, Inc. for Certificate Authority; Application**

**AGENCY:** Department of Transportation.

**ACTION:** Notice of Order to Show Cause, (Order 87-5-17) Docket 44525.

**SUMMARY:** The Department of Transportation is directing all interested persons to show cause why it should not issue an order finding MGM Grand Air, Inc., fit and awarding it a certificate of public convenience and necessity to engage in scheduled interstate and overseas air transportation.

**DATES:** Persons wishing to file objections should do so no later than May 18, 1987.

**ADDRESSES:** Responses should be filed in Docket 44525 and addressed to the Documentary Service Division (C-55, Room 4107), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590 and should be

served upon the parties listed in Attachment A to the order.

**FOR FURTHER INFORMATION CONTACT:**

Mr. Stephen H. Davis, U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590, (202) 366-1049.

Dated: May 6, 1987.

Mathew V. Scocozza,

Assistant Secretary for Policy and International Affairs.

[FR Doc. 87-10881 Filed 5-12-87; 8:45 am]

BILLING CODE 4910-62-M

**Federal Aviation Administration**

**Radio Technical Commission for Aeronautics (RTCA); Special Committee 160, 406 MHz Emergency Locator Transmitters (ELT); Meeting**

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. I) notice is hereby given of a meeting of RTCA Special Committee 160 on 406 MHz Emergency Locator Transmitters (ELT) to be held on June 8-10, 1987, in the RTCA Conference Room, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, DC, commencing at 9:30 a.m.

The Agenda for this meeting is as follows: (1) Chairman's Remarks; (2) Approval of the Minutes of the Third Meeting; (3) review and discuss EUROCAE WG-29 activities; (4) report on potential problems of frequency interference in the 406 MHz band; (5) review NOAA data base procedures; (6) review of task assignments from last meeting; (7) review the first draft of the MOPS; (8) task assignments; and (9) other business.

Attendance is open to the interested public but limited to space available. With the approval of the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, DC, 20005; (202) 682-0266. Any member of the public may present a written statement to the committee at any time.

Issued at Washington, DC., on May 5, 1987.

Wendie F. Chapman,

Designated Officer.

[FR Doc. 87-10854 Filed 5-12-87; 8:45 am]

BILLING CODE 4910-13-M

**Radio Technical Commission for Aeronautics (RTCA); Special Committee 159, Minimum Aviation System Performance Standards for Global Positioning System; Meeting**

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. I) notice is hereby given of a meeting of RTCA Special Committee 159 on Minimum Aviation System Performance Standards for Global Positioning System to be held on June 3-5, 1987, in the RTCA Conference Room, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, DC., commencing at 9:30 a.m.

The agenda for this meeting is as follows: (1) Chairman's remarks; (2) approval of minutes of the fifth meeting; (3) briefing and discussion on development of standards for a GPS/LORAN C hybrid system; (4) report of integrity working group activities; (5) review of task assignments; (6) assignment of tasks; and (7) other business.

Attendance is open to the interested public but limited to space available. With the approval of the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, DC. 20005; (202) 682-0266. Any member of the public may present a written statement to the committee at any time.

Issued in Washington, DC., on May 5, 1987.

Wendie F. Chapman,

Designated Officer.

[FR Doc. 87-10855 Filed 5-12-87; 8:45 am]

BILLING CODE 4910-13-M

**Saint Lawrence Seaway Development Corporation**

**Advisory Board Meeting**

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. I) notice is hereby given of a meeting of the Advisory Board of the Saint Lawrence Seaway Development Corporation, to be held at 2:00 p.m., June 16, 1987, at the Corporation's Administration Headquarters, Room 5424, 400 Seventh St. SW., Washington, DC. The agenda for this meeting will be as follows: Opening Remarks, Consideration of Minutes of Past Meeting; Review of Programs; Business; Closing Remarks.

Attendance at meeting is open to the interested public but limited to space

available. With the approval of the Administrator, members of the public may present oral statements at the meeting. Persons wishing further information should contact not later than June 12, 1987, Joan C. Hall, Advisory Board Liaison, Saint Lawrence Seaway Development Corporation, 400 Seventh Street SW., Washington, DC 20590; 202/366-0118.

Any member of the public may present a written statement to the Advisory Board at any time.

Issued at Washington, DC, on May 4, 1987.

Joan C. Hall,

Advisory Board Liaison.

[FR Doc. 87-10874 Filed 5-12-87; 8:45 am]

BILLING CODE 4910-61-M

**DEPARTMENT OF THE TREASURY**

**Public Information Collection Requirements Submitted to OMB for Review**

Dated: May, 1987.

The Department of Treasury has Submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Office listed. Comments to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue NW., Washington, DC 20220.

Alcohol, Tobacco and Firearms

OMB Number: 1512-0020

Form Number: ATF Form 9 (5320.9)

Type of Review: Extension

Title: Application and Permit for

Permanent Exportation of Firearms

Description: This form is used to move National Firearms Act weapons legally into export channels and serves as a vehicle to allow either the removal of the weapon from the National Firearms Registration and Transfer Record or to the collection of an excise tax. It is used by firearms manufacturers, exporters and others to obtain a benefit and by the Treasury Department to determine/collect taxes

Respondents: Individuals, Businesses

Estimated Burden: 595 hours

OMB Number: 1512-0141

Form Number: ATF F 2635 (5620.8)

Type of Review: Revision

Title: Claim-Alcohol, Tobacco and Firearms Taxes

Description: ATF F 2635 (5620.8) is used by a taxpayer to show the basis for a credit remission and allowance of tax on a loss of taxable articles (distilled spirits, wine, beer, tobacco products and firearms). ATF F 2635 (5620.8) is submitted along with supporting documentation to indicate why a credit of Federal tax should be made to the claimant

Respondents: Individuals, Businesses

Estimated Burden: 63,950 hours

Clearance Officer: Robert Masarsky,

(202) 566-7077, Bureau of Alcohol,

Tobacco and Firearms, Room 7011,

1200 Pennsylvania Avenue, NW.,

Washington, DC 20226

OMB Reviewer: Milo Sunderhauf, (202)

395-6880, Office of Management and

Budget, Room 3208, New Executive

Office Building, Washington, DC

20503.

**U.S. Customs Service**

OMB Number: 1515-0121

Form Number: None

Type of Review: Extension

Title: Establishment of a Bonded

Warehouse

Description: Owners or lessees desiring to establish a bonded warehouse must make written application to the district director where the warehouse is located, along with other documents pursuant to 19 CFR 19.2

Respondents: Businesses

Estimated Burden: 135 hours

Clearance Officer: B. J. Simpson, (202)

566-7529, U.S. Customs Service Room

6426, 1301 Constitution Avenue NW,

Washington, DC. 20229

OMB Reviewer: Milo Sunderhauf, (202)

395-6880, Office of Management and

Budget, Room 3208, New Executive

Office Building, Washington, DC

20503.

Dale A. Morgan,

Departmental Reports Management Officer.

[FR Doc. 87-10931 Filed 5-12-87; 8:45 am]

BILLING CODE 4810-25-M

**Customs Service**

[T.D. 87-67]

**Recordation of Trade Name; Snyder Laboratories, Inc.**

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of recordation.

SUMMARY: On February 23, 1987, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "Snyder Laboratories, Inc." was published in the Federal Register

(52 FR 5517). The notice advised that before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation and received not later than April 24, 1987. No responses were received in opposition to the notice.

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "Snyder Laboratories, Inc." is recorded as the trade name used by Snyder Laboratories, Inc., a corporation organized under the laws of the State of Delaware, located at 200 West Ohio Avenue, Dover, Ohio 44622. The trade name is used in connection with the developing and marketing of medical devices and equipment, including wound drainage devices and any parts, developments, extensions and accessories, including tubing, sterile needles and sterile connectors, manufactured in the United States.

**DATE:** May 12, 1987.

**FOR FURTHER INFORMATION CONTACT:** Harriet Lane, Entry, Licensing and Restricted Merchandise Branch, 1301 Constitution Avenue NW., Washington, DC 20229 (202-566-5765).

Dated: May 7, 1987.

Steven Pinter,  
Chief, Entry, Licensing and Restricted  
Merchandise Branch.

[FR Doc. 87-10963 Filed 5-12-87; 8:45 am]

BILLING CODE 4820-02-M

## UNITED STATES INFORMATION AGENCY

### Central American University Partnership Program; Request for Concept Papers

#### Summary

The Bureau of Educational and Cultural Affairs of the United States Information Agency invites concept papers for a pilot program of support for institutional partnerships between U.S. and Central American universities. In conjunction with other regional initiatives resulting from the recommendations of the National Bipartisan Commission on Central America (Kissinger Commission), these partnerships are intended to strengthen Central American universities. One-time grants-in-aid will be made available to selected U.S. partner institutions for a period of up to three years. Total funding for each grant will not exceed \$200,000.

The focus of the Central American Universities Partnership Program is on the development of the Central American academic department, hence

the majority of grantees will be faculty members from Central America engaged in graduate degree programs and non-degree academic and professional development activities. A smaller but no less important component will be the participation of U.S. faculty members in the academic programs of the Central American department or equivalent unit.

#### Program Parameters

##### Countries and Disciplines

Participating Central American countries and the academic discipline identified for each are as follows:

Costa Rica—Education  
El Salvador—Education  
Guatemala—Political science  
Honduras—Education  
Panama—Education

##### Grant Characteristics:

A. Approximately \$165,000 of each grant would be used for travel, tuition, maintenance, and related expenses to bring Central American faculty members to the United States for degree and non-degree study, i.e. combinations of graduate degree programs, English language training and programs of shorter duration such as special seminars or research exchanges for professional development and research.

B. The balance of grant funds (approximately \$35,000) will be available for travel and per diem only for 1) U.S. faculty to lecture at the Central American institution, 2) U.S. administrators to resolve curricular and organizational issues, and 3) U.S. faculty to conduct seminars and collaborative research.

##### Time Frame

The partnership program will start by January 1, 1988 and should extend from approximately 30 to no longer than 36 months thereafter.

#### Request for Concept Papers

U.S. academic institutions are invited to submit concept papers describing institutional capacity, interests, strengths and capabilities with regard to the partnership program described above. An institution may submit a statement for either political science or education. Institutions interested in applying for both subject areas must submit separate statements for each area. If the area of interest is education, a university should indicate in priority order the countries in which it would prefer to work.

Concept papers should not be devoted to a partnership with a specific Central American University or department.

*Statements should include, but not be limited to:*

1. Description of the university's plan for administering the program, including staffing, interdepartmental support, etc.;
2. Departmental characteristics and resources that support the partnership; facility specialties and Spanish language skills (in all specialties in which the institution proposes to work), student programs, research projects, opportunities for graduate degree and non-degree study and professional development;
3. Student support services, intensive English language training capabilities, experience with Central American students, and ability to facilitate grantee graduate admission consistent with program needs;
4. Description of current affiliations with universities in the developing world, especially in Latin America;
5. Country-specific interests which the university (or department) is pursuing or wishes to develop;
6. Indications of the university's willingness to contribute to the project's cost, by providing tuition reductions, in-kind contributions, personnel time, or other measures of overall cost-effectiveness;
7. Proposals for follow-up activities beyond the period of the grant.

#### The Selection Process

USIA will use concept papers to select a short list of finalists, based upon:

1. Demonstration of the university's administrative capability and the department's relevant strengths, program offerings, faculty experience and language skills;
2. Demonstrable quality of the university's student support services and ESL program;
3. Evidence of institutional interest and experience in the region;
4. Indications of cost effectiveness;
5. Potential for continued impact following the grant period;

Finalists will be invited to submit a final proposal by August 7, 1987. The letter of invitation will name the particular Central American partner department, elaborate in greater detail the area of project focus, and describe the goals, strengths, and needs to be addressed in the partnership.

#### Calendar

- June 8: Concept papers due.
- August 7: Finalists invited to submit final partnership proposals.
- September 11: Finalists' proposals due.
- November 1: Awards announced.

**Format**

The concept paper, including summary bio-data, should consist of no more than ten pages, the first page of which should be a summary. The number of attachments and other supportive documentation (such as catalogs, departmental publications, brochures, etc.) should be kept to a

manageable size. Please submit ten copies of the concept paper and its attachments.

A separate RFP will be issued to finalists concerning proposals.

Requests for further information should be directed to: Amy K. Levine, Tel. 202/485-7389, USIA, E/AEL, Room 242, 301 Fourth Street, SW., Washington, DC 20547.

Concept papers should be received no later than 5 p.m. on June 8, 1987.

Dated: May 6, 1987.

**Dr. Mark Blitz,**

*Associate Director, Bureau of Educational and Cultural Affairs.*

[FR Doc. 87-10895 Filed 5-12-87; 8:45 am]

BILLING CODE 8230-01-M

# Sunshine Act Meetings

Federal Register

Vol. 52, No. 92

Wednesday, May 13, 1987

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

## NUCLEAR REGULATORY COMMISSION

**DATE:** Weeks of May 11, 18, 25, and June 1, 1987.

**PLACE:** Commissioners' Conference Room, 1717 H Street, NW., Washington, DC.

**STATUS:** Open and Closed.

### MATTERS TO BE CONSIDERED

#### Week of May 11

*Wednesday, May 13*

10:00 a.m.

Briefing on NRC/DOE Comparability Study (Closed—Ex. 1)

2:00 p.m.

Periodic Briefing by INPO (Public Meeting)

3:30 p.m.

Affirmation/Discussion and Vote (Public Meeting)

a. Proposed Agreement Between State of Illinois and NRC (Proposed Order to Allied Chemical) (Tentative)

#### Week of May 18—Tentative

*Wednesday, May 20*

10:00 a.m.

Discussion of Management-Organization and Internal Personnel Matters (Closed—Ex. 2 & 6)

*Thursday, May 21*

3:30 p.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed)

#### Week of May 25—Tentative

*Friday, May 29*

10:00 a.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed)

#### Week of June 1—Tentative

*Friday, June 5*

10:00 a.m.

Discussion/Possible Vote on Full Power Operating License for Braidwood (Public Meeting) (Tentative)

11:30 a.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed)

**TO VERIFY THE STATUS OF MEETINGS CALL (RECORDING):** (202) 634-1498.

#### CONTACT PERSON FOR MORE

**INFORMATION:** Robert McOskey (202) 634-1410.

Andrew L. Bates,

*Office of the Secretary.*

May 7, 1987.

[FR Doc. 87-10959 Filed 5-8-87; 4:55 pm]

**BILLING CODE** 7590-01-M

# Corrections

Federal Register

Vol. 52, No. 92

Wednesday, May 13, 1987

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 266

[FRL-3153-5]

### Burning of Hazardous Waste in Boilers and Industrial Furnaces

#### Correction

In proposed rule document 87-9769 beginning on page 16982 in the issue of Wednesday, May 6, 1987, make the following correction:

#### § 266.34-4 [Corrected]

On page 17041, in § 266.34-4(c)(1), in the second column, the last two lines were incorrectly placed and should appear immediately following the 16th line in the third column.

BILLING CODE 1505-01-D

## FEDERAL HOME LOAN BANK BOARD

### 12 CFR Part 563

[No. 87-517]

### Bank Secrecy Act Compliance Procedures

#### Correction

In proposed rule document 87-10578 beginning on page 17406 in the issue of Friday, May 8, 1987, make the following correction:

On page 17408, in the first column, insert the following name and title preceding the FR document line:

*Jeff Sconyers,*  
Secretary.

BILLING CODE 1505-01-D

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### Advisory Committees; Meetings

#### Correction

In notice document 87-8234 beginning on page 12078 in the issue of Tuesday, April 14, 1987, make the following correction:

On page 12078, in the third column, in the fifth complete paragraph, in the last

line, the U.S.C. cite should read "(5 U.S.C. 552b(c)(4))".

BILLING CODE 1505-01-D

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### Farmer's Union Grain Terminal Association; Withdrawal of Approval of NADA

#### Correction

In notice document 87-8232 appearing on page 12081 in the issue of Tuesday, April 14, 1987, make the following correction:

In the first column, in the last line, the U.S.C. cite should read "(21 U.S.C. 360b(e))".

BILLING CODE 1505-01-D

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# United States Federal Probation

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Wednesday  
May 13, 1987

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## Part II

## United States Sentencing Commission

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Sentencing Guidelines for United States  
Courts; Notice

## UNITED STATES SENTENCING COMMISSION

### Sentencing Guidelines for United States Courts

**AGENCY:** United States Sentencing Commission.

**ACTION:** Notice of Sentencing Guidelines and Policy Statements for the United States Courts as submitted to Congress, together with Certain Technical, Conforming, and Clarifying Amendments.

**SUMMARY:** These guidelines and policy statements are promulgated for use by the federal courts in determining the sentences to be imposed in criminal cases. The sentencing reform provisions of the Comprehensive Crime Control Act of 1984 created the U.S. Sentencing Commission and charged it with the duty of promulgating sentencing guidelines. The guidelines are designed to provide certainty and fairness in meeting the purposes of sentencing. The objective is to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct, while maintaining sufficient flexibility to permit individualized sentencing when warranted by mitigating or aggravating factors not taken into account in the guidelines.

**SUMMARY:** The law provides for a six-calendar-month period of Congressional review and examination, commencing with submission of the guidelines to Congress on April 13, 1987. The law further provides that unless by law Congress modifies, postpones, or rejects them, the guidelines become effective November 1, 1987. Subsequent to submission of the initial guidelines, the Commission, on May 1, 1987, has submitted to Congress a list of technical, conforming, and clarifying amendments to the initial guidelines. Amendments to guidelines are subject to a 180-day Congressional review period before they take effect.

**ADDRESSES:** Comments on the guidelines submitted to Congress are properly directed to Congress at this point. Those wishing to comment may write a particular member of Congress; or the Chairman of the Senate Committee on the Judiciary, Senator Joseph R. Biden, Jr., U.S. Senate, Washington, DC 20510; or the Chairman of the House Committee on the Judiciary, Representative Peter W. Rodino, Jr., U.S. House of Representatives, Washington, DC 20515.

The Commission would appreciate receiving a copy of any comments sent to Congress with respect to the

guidelines and policy statements. Comments may be mailed to: United States Sentencing Commission, 1331 Pennsylvania Avenue NW., Suite 1400, Washington, DC 20004, Attention: Sentencing Guidelines Comment.

**FOR FURTHER INFORMATION CONTACT:** Paul K. Martin, Communications Director for the Commission, telephone (202) 662-8800.

**SUPPLEMENTARY INFORMATION:** The United States Sentencing Commission is an independent commission in the judicial branch of the United States Government. Ordinarily, the Administrative Procedure Act rulemaking requirements (including publication in the *Federal Register*, public comment and public hearing procedures) are not applicable to judicial branch agencies. However, 28 U.S.C. 994(x) makes the Administrative Procedure Act rulemaking provisions of 5 U.S.C. 553 applicable to the promulgation of sentencing guidelines by the Sentencing Commission. Pursuant to this requirement, the Commission has published two previous drafts of sentencing guidelines in the *Federal Register* for public comment, held public hearings on each of them, and is now publishing these guidelines as promulgated by the Commission and submitted to Congress, including certain technical, conforming, and clarifying amendments.

In order to facilitate public input at an early stage of its guidelines development process, the Commission published a preliminary draft of guidelines and policy statements in the October 1, 1986, *Federal Register* [51 FR 35079]. Additionally, the Commission disseminated more than 6000 copies of that preliminary draft to a variety of interested groups and individuals and held six regional public hearings.

Based upon the public comment received on the preliminary draft, as well as additional analysis of research data and further deliberations, the Commission prepared and published a substantially revised draft of proposed guidelines and policy statements in the February 6, 1987, *Federal Register* [52 FR 3919]. The Commission distributed approximately 6000 copies of this revised draft to the public and held public hearings in Washington, DC on March 11 and 12, 1987.

After considering public comment on the revised draft, reviewing additional analyses of the research data which the Commission has continued to develop and refine, and consulting with a variety of experts on sentencing issues, the Commission further revised the guidelines and submitted them to

Congress as required. The vote of the Commission by which the guidelines were approved was 6 to 1, as follows: "Aye"—Commissioners William W. Wilkins, Jr., Michael K. Block, Stephen G. Breyer, Helen G. Corrothers, George E. MacKinnon, Ilene H. Nagel; "Nay"—Commissioner Paul H. Robinson.

The initial guidelines, policy statements, and commentary submitted to Congress on April 13, 1987, are published here. Following those materials are the technical, conforming, and clarifying amendments, including the statutory index, submitted to Congress on May 1, 1987, along with a brief explanation of the amendments. The vote of the Commission by which the technical, conforming and clarifying amendments were approved was 6 to 0, as follows: "Aye"—Commissioners Wilkins, Block, Breyer, Corrothers, MacKinnon, Nagel; "Abstain"—Commissioner Robinson.

The Commission is in the process of printing and binding the guidelines and policy statements as submitted to Congress that incorporate the technical, conforming, and clarifying amendments. The Commission will distribute copies to all Members of Congress, Federal Judges, U.S. Magistrates, U.S. Attorneys, Federal Public Defenders, and U.S. Probation Offices. Other persons may purchase the document through the Government Printing Office.

**Authority:** Section 217(a) of the Comprehensive Crime Control Act of 1984 (28 U.S.C. 994 (a), (p), (x)).  
William W. Wilkins, Jr.,  
Chairman.

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\*Commissioner Ronald L. Gainer, one of the two non-voting, ex officio members, stated that if he were a voting Commissioner, as a personal matter, he would not have voted to support the guidelines in their current form.

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### CHAPTER ONE—INTRODUCTION AND OVERVIEW

#### 1. Authority

The United States Sentencing Commission ("Commission") is an independent agency in the judicial branch composed of seven voting and two non-voting, ex officio members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.

The guidelines and policy statements promulgated by the Commission are issued pursuant to section 994(a) of Title 28, United States Code.

#### 2. The Statutory Mission

The Comprehensive Crime Control Act of 1984 foresees guidelines that will further the basic purposes of criminal punishment by deterring crime, incapacitating the offender, providing

just punishment, and rehabilitating the offender. It delegates to the Commission broad authority to review and rationalize the federal sentencing process.

The statute contains many detailed instructions as to how this determination should be made, but the most important of them instructs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of "bank robbery/committed with a gun/\$2,500 taken." An offender characteristic category might be "offender with one prior conviction who was not sentenced to imprisonment." The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons, to be determined by coordinating the offense behavior categories with the offender characteristic categories. The statute contemplates the guidelines will establish a range of sentences for every coordination of categories. Where the guidelines call for imprisonment, the range must be narrow: The maximum imprisonment cannot exceed the minimum by more than the greater of 25 percent or 6 months. 28 U.S.C. 994(b)(2).

The sentencing judge must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the judge to depart from the guidelines and sentence outside the range. In that case, the judge must specify reasons for departure. 18 U.S.C. 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to see if the guideline was correctly applied. If the judge departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. 3742. The Act requires the offender to serve virtually all of any prison sentence imposed, for it abolishes parole and substantially restructures good behavior adjustments.

The law requires the Commission to send its initial guidelines to Congress by April 13, 1987, and under the present statute they take effect automatically on November 1, 1987. Pub. L. 98-473, section 235, reprinted at 18 U.S.C. 3551. The Commission may submit guideline amendments each year to Congress between the beginning of a regular session and May 1. The amendments will take effect automatically 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. 994(p).

The Commission, with the aid of its legal and research staff, considerable public testimony and written

commentary, has developed an initial set of guidelines which it now transmits to Congress. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines by submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts throughout the nation.

### 3. The Basic Approach

To understand these guidelines and the rationale that underlies them, one must begin with the three objectives that Congress, in enacting the new sentencing law, sought to achieve. Its basic objective was to enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system. To achieve this objective, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arises out of the present sentencing system which requires a judge to impose an indeterminate sentence that is automatically reduced in most cases by "good time" credits. In addition, the parole commission is permitted to determine how much of the remainder of any prison sentence an offender actually will serve. This usually results in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence handed down by the court.

Second, Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.

Honesty is easy to achieve: The abolition of parole makes the sentence imposed by the court the sentence the offender will serve. There is a tension, however, between the mandate of uniformity (treat similar cases alike) and the mandate of proportionality (treat different cases differently) which, like the historical tension between law and equity, makes it difficult to achieve both goals simultaneously. Perfect uniformity—sentencing every offender to five years—destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but

might lump together offenses that are different in important respects. For example, a single category for robbery that lumps together armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, is far too broad.

At the same time, a sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect. A bank robber with (or without) a gun, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected (and therefore may already be counted, to a different degree, in the punishment for the underlying offense); and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies, depending on how much other harm has occurred. (Thus, one cannot easily assign points for each kind of harm and simply add them up, irrespective of context and total amounts.)

The larger the number of subcategories, the greater the complexity that is created and the less workable the system. Moreover, the subcategories themselves, sometimes too broad and sometimes too narrow, will apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a

complex system of subcategories, would have to make a host of decisions about whether the underlying facts are sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different judges will apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to eliminate.

In view of the arguments, it is tempting to retreat to the simple, broad-category approach and to grant judges the discretion to select the proper point along a broad sentencing range. Obviously, however, granting such broad discretion risks correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. That is to say, such an approach risks a return to the wide disparity that Congress established the Commission to limit.

In the end, there is no completely satisfying solution to this practical stalemate. The Commission has had to simply balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any ultimate system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the moral principle of "just deserts." Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Thus, if a defendant is less culpable, the defendant deserves less punishment. Others argue that punishment should be imposed primarily on the basis of practical "crime control" considerations. Defendants sentenced under this scheme should receive the punishment that most effectively lessens the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of these points of view have urged the Commission to choose between them, to accord one primacy

over the other. Such a choice would be profoundly difficult. The relevant literature is vast, the arguments deep, and each point of view has much to be said in its favor. A clear-cut Commission decision in favor of one of these approaches would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation. As a practical matter, in most sentencing decisions both philosophies may prove consistent with the same result.

For now, the Commission has sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that uses data estimating the existing sentencing system as a starting point. It has analyzed data drawn from 10,000 presentence investigations, crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and resulting statistics, and data from other relevant sources, in order to determine which distinctions are important in present practice. After examination, the Commission has accepted, modified, or rationalized the more important of these distinctions.

This empirical approach has helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, is short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit many distinctions that some may believe important, yet they include most of the major distinctions that statutes and presentence data suggest make a significant difference in sentencing decisions. Important distinctions that are ignored in existing practice probably occur rarely. A sentencing judge may take this unusual case into account by departing from the guidelines.

The Commission's empirical approach has also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of moral consensus might make it difficult to say exactly what punishment is deserved for a particular crime, specified in minute detail. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient, readily available data might make it difficult to say exactly what punishment will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have in fact made over the course of time. These established distinctions are

ones that the community believes, or has found over time, to be important from either a moral or crime-control perspective.

The Commission has not simply copied estimates of existing practice as revealed by the data (even though establishing offense values on this basis would help eliminate disparity, for the data represent averages). Rather, it has departed from the data at different points for various important reasons. Congressional statutes, for example, may suggest or require departure, as in the case of the new drug law that imposes increased and mandatory minimum sentences. In addition, the data may reveal inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from present practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these initial guidelines are but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission has developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, and therefore effective, sentencing system.

#### 4. The Guidelines' Resolution of Major Issues

The guideline-writing process has required the Commission to resolve a host of important policy questions, typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction will briefly discuss several of those issues. Commentary in the guidelines explains others.

##### (a) Real Offense vs. Charge Offense Sentencing

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of

the offense with which the defendant was charged and of which he was convicted ("charge offense" sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken \$50,000, injured a teller, refused to stop when ordered, and raced away damaging property during escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a real offense system. After all, the present sentencing system is, in a sense, a real offense system. The sentencing court (and the parole commission) take account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process, given the potential existence of hosts of adjudicated "real harm" facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable, and, in the Commission's view, risked return to wide disparity in practice.

The Commission therefore abandoned the effort to devise a "pure" real offense system and instead experimented with a "modified real offense system", which it published for public comment in a September 1986 preliminary draft.

This version also foundered in several major respects on the rock of practicality. It was highly complex and its mechanical rules for adding harms (e.g., bodily injury added the same punishment irrespective of context) threatened to work considerable

unfairness. Ultimately, the Commission decided that it could not find a practical or fair and efficient way to implement either a pure or modified real offense system of the sort it originally wanted, and it abandoned that approach.

The Commission, in its January 1987 Revised Draft and the present guidelines, has moved closer to a "charge offense" system. The system is not, however, pure; it has a number of real elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law have forced the Commission to write guidelines that are descriptive of generic conduct rather than tracking purely statutory language. For another, the guidelines, both through specific offense characteristics and adjustments, take account of a number of important, commonly occurring real offense element such as role in the offense, the presence of a gun, or the amount of money actually taken.

Finally, it is important not to overstate the difference in practice between a real and a charge offense system. The federal criminal system, in practice, deals mostly with drug offenses, bank robberies and white collar crimes (such as fraud, embezzlement, and bribery). For the most part, the conduct that an indictment charges approximates the real and relevant conduct in which the offender actually engaged.

The Commission recognizes its system will not completely cure the problems of a real offense system. It may still be necessary, for example, for a court to determine some particular real facts that will make a difference to the sentence. Yet, the Commission believes that the instances of controversial facts will be far fewer; indeed, there will be few enough so that the court system will be able to devise fair procedures for their determination. See *United States v. Fatico*, 579 F.2d 707 (2d Cir.1978) (permitting introduction of hearsay evidence at sentencing hearing under certain conditions), on remand, 458 F. Supp. 388 (E.D.N.Y. 1978), aff'd, 603 F.2d 1053 (2d Cir. 1979) (holding that the government need not prove facts at sentencing hearing beyond a reasonable doubt), cert. denied, 444 U.S. 1073 (1980).

The Commission also recognizes that a charge offense system has drawbacks of its own. One of the most important is its potential to turn over to the prosecutor the power to determine the sentence by increasing or decreasing the number (or content) of the counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's

sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin, or theft of \$10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of \$30,000. Further, a sentencing court may control any inappropriate manipulation of the indictment through use of its power to depart from the specific guideline sentence. Finally, the Commission will closely monitor problems arising out of count manipulation and will make appropriate adjustments should they become necessary.

#### (b) Departures.

The new sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance . . . that was not adequately taken into consideration by the Sentencing Commission . . .". 18 U.S.C. 3553(b). Thus, in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the courts' departure powers. The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), the third sentence of § 5H1.4, and the last sentence of § 5K2.12, list a few factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two basic reasons. First is the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that in the initial set of guidelines it need not do so. The

Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted.

Second, the Commission believes that despite the courts legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's sentencing data indicate make a significant difference in sentencing at the present time. Thus, for example, where the presence of actual physical injury currently makes an important difference in final sentences, as in the case of robbery, assault, or arson, the guidelines specifically instruct the judge to use this factor to augment the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data do not permit the Commission, at this time, to conclude that the factor is empirically important in relation to the particular offense. Of course, a factor (say physical injury) may nonetheless sometimes occur in connection with a crime (such as fraud) where it does not often occur. If, however, as the data indicate, such occurrences are rare, they are precisely the type of events that the court's departure powers were designed to cover—unusual cases outside the range of the more typical offenses for which the guidelines were designed. Of course, the Commission recognizes that even its collection and analysis of 10,000 presentence reports are an imperfect source of data sentencing estimates. Rather than rely heavily at this time upon impressionistic accounts, however, the Commission believes it wiser to wait and collect additional data from our continuing monitoring process that may demonstrate how the guidelines work in practice before further modification.

It is important to note that the guidelines refer to three different kinds of departure. The first kind, which will most frequently be used, is in effect an interpolation between two adjacent, numerically oriented guideline rules. A specific offense characteristic, for example, might require an increase of four levels for serious bodily injury but two levels for bodily injury. Rather than requiring a court to force middle instances into either the "serious" or the "simple" category, the guideline commentary suggests that the court may

interpolate and select a midpoint increase of three levels. The Commission has decided to call such an interpolation a "departure" in light of the legal views that a guideline providing for a range of increases in offense levels may violate the statute's 25 percent rule (though others have presented contrary legal arguments). Since interpolations are technically departures, the courts will have to provide reasons for their selection, and it will be subject to review for "reasonableness" on appeal. The Commission believes, however, that a simple reference by the court to the "mid-category" nature of the facts will typically provide sufficient reason. It does not foresee serious practical problems arising out of the application of the appeal provisions to this form of departure.

The second kind involves instances in which the guidelines provide specific guidance for departure, by analogy or by other numerical or non-numerical suggestions. For example, the commentary to § 2G1.1 (Transportation for Prostitution), recommends a downward adjustment of eight levels where commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions, and that the courts of appeals may prove more likely to find departures "unreasonable" where they fall outside suggested levels.

A third kind of departure will remain unguided. It may rest upon grounds referred to in Chapter 5, Part H, or on grounds not mentioned in the guidelines. While Chapter 5, Part H lists factors that the Commission believes may constitute grounds for departure, those suggested grounds are not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly unusual.

#### (c) *Plea Agreements*

Nearly ninety percent of all federal criminal cases involve guilty pleas, and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts have urged the Commission not to attempt any major reforms of the agreement process, on the grounds that any set of guidelines that threatens to radically change present practice also threatens to make the federal system unmanageable. Others, starting with the same facts, have argued that guidelines

which fail to control and limit plea agreements would leave untouched a "loophole" large enough to undo the good that sentencing guidelines may bring. Still other commentators make both sets of arguments.

The Commission has decided that these initial guidelines will not, in general, make significant changes in current plea agreement practices. The court will accept or reject any such agreements primarily in accordance with the rules set forth in Fed.R.Crim.P. 11(e). The Commission will collect data on the courts' plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate.

The Commission nonetheless expects the initial set of guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. Insofar as a prosecutor and defense attorney seek to agree about a likely sentence or range of sentences, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which judges will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation. Since they will have before them the norm, the relevant factors (as disclosed in the plea agreement), and the reason for the agreement, they will find it easier than at present to determine whether there is sufficient reason to accept a plea agreement that departs from the norm.

#### (d) *Probation and Split Sentences.*

The statute provides that the guidelines are to "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . ." 28 U.S.C. 994(j). Under present sentencing practice, courts sentence to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are "serious." If the guidelines were to permit courts to impose probation instead of prison in many or all such cases, the present

sentences would continue to be ineffective.

The Commission's solution to this problem has been to write guidelines that classify as "serious" (and therefore subject to mandatory prison sentences) many offenses for which probation is now frequently given. At the same time, the guidelines will permit the sentencing court to impose short prison terms in many such cases. The Commission's view is that the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes, particularly when compared with the status quo where probation, not prison, is the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through six, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels seven through ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement or intermittent confinement). For offense levels eleven and twelve, the court must impose at least one half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

#### (e) *Multi-Count Convictions*

The Commission, like other sentencing commissions, has found it particularly difficult to develop rules for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The reason it is difficult is that when an defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to life sentences of imprisonment—sentences that neither "just deserts" nor "crime control" theories of punishment would find justified.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment when multiple offenses that are the subjects of separate counts take place.

These rules are set out in Chapter Three, Part D. They essentially provide: (1) When the conduct involves fungible items, e.g., separate drug transactions or thefts of money, the amounts are added and the guidelines apply to the total amount. (2) When nonfungible harms are involved, the offense level for the most serious count is increased (according to a somewhat diminishing scale) to reflect the existence of other counts of conviction.

The rules have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures where necessary to produce a mitigated sentence.

#### (f) Regulatory Offenses

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These criminal statutes pose two problems. First, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it cannot comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission has sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses are particularly important in light of the

need for enforcement of the general regulatory scheme. The Commission has sought to treat these offenses in these initial guidelines. It will address the less common regulatory offenses in the future.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses, dividing them into four categories.

First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper treatment of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense is as follows:

(1) The guideline provides a low base offense level (6) aimed at the first type of recordkeeping or reporting offense. It gives the court the legal authority to impose a punishment ranging from probation up to six months of imprisonment.

(2) Specific offense characteristics designed to reflect substantive offenses that do occur (in respect to some regulatory offenses), or that are likely to occur, increase the offense level.

(3) A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will be treated like the substantive offense.

The Commission views this structure as an initial effort. It may revise its approach in light of further experience and analysis of regulatory crimes.

#### (g) Sentencing Ranges

In determining the appropriate sentencing ranges for each offense, the Commission began by estimating the average sentences now being served within each category. It also examined the sentence specified in congressional statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's forthcoming detailed report will contain a comparison between estimates of existing sentencing practices and sentences under the guidelines.

While the Commission has not considered itself bound by existing sentencing practice, it has not tried to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences in many instances will approximate existing practice, but adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons now receive probation, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who now receive probation from those who receive more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a current sentencing practice of very wide variability in which some defendants receive probation while others receive several years in prison for the same offense. Moreover, insofar as many who currently plead guilty often receive lesser sentences, so the guidelines also provide potential discounts for those defendants who accept responsibility and those who cooperate with the government.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the new drug law and the career offender provisions of the sentencing law, require the Commission to promulgate rules that will lead to substantial prison population increases. These increases will occur irrespective of any guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum, or career offender, sentences), will lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons, estimate at approximately 10 percent.

#### (h) The Sentencing Table

The Commission has established a sentencing table. For technical and practical reasons it has 43 levels. Each row in the table contains levels that overlap with the levels in the preceding and succeeding rows. By overlapping the levels, the table should discourage unnecessary litigation. Both prosecutor and defendant will realize that the difference between one level and another will not necessarily make a difference in the sentence that the judge imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether \$10,000 or \$11,000 was obtained as a result of a fraud. At the same time, the rows work

to increase a sentence proportionately. A change of 6 levels roughly doubles the sentence irrespective of the level at which one starts. The Commission, aware of the legal requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months, also wishes to permit courts the greatest possible range for exercising discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the judge within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many, rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation as to which category an offender fell within would become more likely. Where a table has many smaller monetary distinctions, it minimizes the likelihood of litigation, for the importance of the precise amount of money involved is considerably less.

#### 5. A Concluding Note

The Commission emphasizes that its approach in this initial set of guidelines is one of caution. It has examined the many hundreds of criminal statutes in the United States Code. It has begun with those that are the basis for a significant number of prosecutions. It has sought to place them in a rational order. It has developed additional distinctions relevant to the application of these provisions, and it has applied sentencing ranges to each resulting category. In doing so, it has relied upon estimates of existing sentencing practices as revealed by its own statistical analyses, based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from existing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with these guidelines will lead to additional information and provide a firm empirical basis for revision.

Finally, the guidelines will apply to approximately 90 percent of all cases in the federal courts. Because of time constraints and the nonexistence of

statistical information, some offenses that occur infrequently are not considered in this initial set of guidelines. They will, however, be addressed in the near future. Their exclusion from this initial submission does not reflect any judgment about their seriousness. The Commission has also deferred promulgation of guidelines pertaining to fines, probation and other sanctions for organizational defendants, with the exception of antitrust violations. The Commission also expects to address this area in the near future.

#### 6. Application Instructions

In applying the guidelines, the user starts with the statute which the defendant was convicted of violating. An index containing the various statutes directs the user to the applicable guideline. That guideline specifies a base offense level. It may also list specific characteristics that, if applicable, adjust the offense level. Other adjustments are then made to the offense level based on certain general features of the offense and offender, such as role in the offense or the presence of a vulnerable victim. This leads to a total offense level. The defendant's criminal history category is then established. Using the total offense level and criminal history category, a table provides a sentencing range within which a sentence is to be imposed.

The Commission will provide each court with worksheets containing detailed instructions on how to apply the guidelines. In general, they will instruct the user to:

1. Apply the Statutory Index, Appendix A, to determine the guideline section in Chapter Two that is applicable to the statute violated. If more than one guideline is referenced for the particular statute, select the guideline most appropriate to the conduct involved in the count of conviction.

2. Apply the base offense level and any appropriate specific offense characteristics contained in the particular guideline in Chapter Two.

3. Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

4. If there are multiple counts of conviction, repeat steps one through three for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

5. Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three. The resulting offense level is the total offense level.

6. Compute the defendant's criminal history category using Part A of Chapter Four.

7. Using the Sentencing Table in Part A of Chapter Five, apply the total offense level and criminal history category to obtain the guideline range.

8. For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

9. Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

## CHAPTER TWO—OFFENSE CONDUCT

### Overview

Chapter Two pertains to offense conduct. The chapter is organized by offenses and divided into parts and related sections that may cover one statute or many. Each offense has a corresponding base offense level. When a particular offense warrants a more individualized sentence, specific offense characteristics are provided within the guidelines. Certain factors relevant to criminal conduct that are not provided in specific guidelines are set forth in Chapter Three, Part A (Victim-Related Adjustments) and Chapter Five, Part K (Departures). The statutes appearing at the beginning of each part are illustrative and do not necessarily include all the statutes covered by the guidelines in that part.

### General Principles Governing Chapter Two

#### § 201. Applicable Guidelines

(a) The court shall apply, within the statutory maximum for the offense of conviction, the guideline in this chapter most applicable to the offense of conviction. Provided, however, in the case of conviction by a plea of guilty or nolo contendere containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the court shall apply the guideline in this chapter most applicable to the stipulated offense.

(b) The court shall determine any applicable specific offense characteristic, victim-related adjustment, or departure from the guidelines attributable to offense conduct, according to the principles in § 202, Relevant Conduct.

## COMMENTARY

Section 201 provides the basic rules for determining the guidelines applicable to the offense conduct under this chapter. As a general rule, the court is to apply the guideline covering the offense conduct most applicable to the offense of conviction. Where a particular statute proscribes a variety of conduct which might constitute the subject of different guidelines, the court will decide which guideline applies based upon the nature of the offense conduct charged.

However, there is a limited exception to this general rule. Where a stipulation as part of a plea of guilty or nolo contendere specifically establishes facts that prove a more serious crime than the crime of conviction, the court is to apply the guideline most applicable to the more serious crime established. The sentence that may be imposed is limited, however, by the statute governing the offense of conviction. See Chapter Five, § 5H6.1 (Statutory Maximum and Minimum Sentences). For example, if the defendant pleads guilty to theft, but admits the elements of robbery as part of the plea agreement, the robbery guideline is to be applied. The sentence, however, may not exceed the maximum sentence for theft. See H. REP. 98-1017, 98th Cong., 2d Sess. 99 (1984).

The exception to the general rule has a practical basis. In cases where the elements of an offense more serious than the offense of conviction are established by the plea, it is of no real benefit to the defendant and may unduly complicate the sentencing process if the applicable guideline does not reflect the seriousness of the defendant's actual conduct. Without this exception, the court would be forced to use an artificial guideline and then depart from it to the degree the court found necessary based upon the more serious conduct established by the plea. The probation officer would be required to calculate a guideline (for the offense of conviction) which might contain characteristics difficult to establish in the context of the actual offense conduct. For example, the guideline in Chapter Two, § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft), contains monetary distinctions which are different in content and effect from the monetary distinctions in the guideline applicable to robbery, § 2B3.1. Yet, without the exception, the probation officer might also need to apply the robbery guideline to assist the court in determining the appropriate degree of departure. This cumbersome, artificial procedure is avoided by using the exception rule in guilty or nolo contendere plea cases where it is applicable.

As with any plea agreement, the court must first determine that the agreement is acceptable, in accordance with the policies stated in Chapter Six, Part B (Plea Agreements). The limited exception provided here applies only after the court has determined that a plea, otherwise fitting the exception, is acceptable.

Section 201(b) directs the court, once it has determined applicable guideline under § 201(a), to determine any applicable specific offense characteristics (under that guideline), any applicable victim-related adjustment from Chapter Three, Part A, and any

guideline departures attributable to the offense conduct Chapter Five, Part K, using a "relevant conduct" standard, as that standard is defined in § 202. In many instances, it will be appropriate that the court consider the actual conduct of the offender, even when such conduct does not constitute an element of the offense. As described above, this may occur when an offender stipulates certain facts in a plea agreement. It is more typically so when the court considers the applicability of specific offense characteristics within individual guidelines, when it considers various adjustments, and when it considers whether or not to depart from the guidelines for reasons relating to offense conduct. In such instances, the court should consider all conduct, circumstances, and injury relevant to the offense (as well as all relevant offender characteristics). See § 202 (Relevant Conduct).

## § 202. Relevant Conduct

To determine the seriousness of the offense conduct, all conduct, circumstances, and injuries relevant to the offense of conviction shall be taken into account.

(a) Unless otherwise specified under the guidelines, conduct and circumstances relevant to the offense of conviction means:

Acts or omissions committed or aided and abetted by the defendant, or by a person for whose conduct the defendant is legally accountable, that (1) are part of the same course of conduct, or a common scheme or plan, as the offense of conviction, or (2) are relevant to the defendant's state of mind or motive in committing the offense of conviction, or (3) indicate the defendant's degree of dependence upon criminal activity for a livelihood.

(b) Injury relevant to the offense of conviction means harm which is caused intentionally, recklessly or by criminal negligence in the course of conduct relevant to the offense of conviction.

## COMMENTARY

Prior to sentencing, a judge should consider all relevant offense and offender characteristics. Relevant offense characteristics are determined in the present chapter; relevant offender characteristics, which may include other similar misconduct, are determined under Chapter Three (Adjustments), and Chapter Four (Criminal History). For purposes of Chapter Two, relevant defendant conduct is restricted to the following:

1. Conduct directed toward preparation for or commission of the offense of conviction, and efforts to avoid detection and responsibility for the offense of conviction;

2. Conduct indicating that the offense of conviction was to some degree part of a broader purpose, scheme, or plan;

3. Conduct that is relevant to the state of mind or motive of the defendant in committing the crime;

4. Conduct that is relevant to the defendant's involvement in crime as a livelihood.

The first three criteria are derived from two sources, Rule 8(a) of the Federal Rules of Criminal Procedure, governing joinder of similar or related offenses, and Rule 404(b) of the Federal Rules of Evidence, permitting admission of evidence of other crimes to establish motive, intent, plan, and common scheme. These rules provide standards that govern consideration at trial of crimes "of the same or similar character," and utilize concepts and terminology familiar to judges, prosecutors, and defenders. The governing standard should be liberally construed in favor of considering information generally appropriate to sentencing. When other crimes are inadmissible under the Rule 404(b) standard, such crimes may not be "relevant to the offense of conviction" under the criteria that determine this question for purposes of Chapter Two; such crimes would, however, be considered in determining the relevant offender characteristics to the extent authorized by Chapter Three (Adjustments), and Chapter Four (Criminal History) and Chapter Five, Part K (Departures). This construction is consistent with the existing rule that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense . . . for the purpose of imposing an appropriate sentence," 18 U.S.C. 3577, so long as the information "has sufficient indicia of reliability to support its probable accuracy." *United States v. Marshall*, 519 F.Supp.751 (D. Wis. 1981), *aff'd*, 719 F.2d 887 (7th Cir. 1983).

The last of these criteria is intended to ensure that a judge may consider at sentencing, information that, although not specifically within other criteria of relevance, indicates that the defendant engages in crime for a living. Inclusion of this information in sentencing considerations is consistent with 28 U.S.C. 994(d)(11).

## § 203. Determining the Offense Level

In determining the offense level prescribed by this chapter:

(a) Determine the base offense level;

(b) Make any applicable adjustments for specific offense characteristics in the order listed;

(c) Make any applicable adjustments from Chapter Three, Part A (Victim-Related Adjustments);

(d) Make any applicable adjustments from Chapter Three, Part B (Role in the Offense);

(e) Make any applicable adjustments from Chapter Three or Chapter Four.

## COMMENTARY

Application of the guidelines for offense conduct is intended to be simple and straightforward. Once the appropriate base offense level is determined, all specific offense characteristics are to be applied in the order listed to determine the applicable offense level.

Where a guideline calls for a specific number plus the offense level applicable to

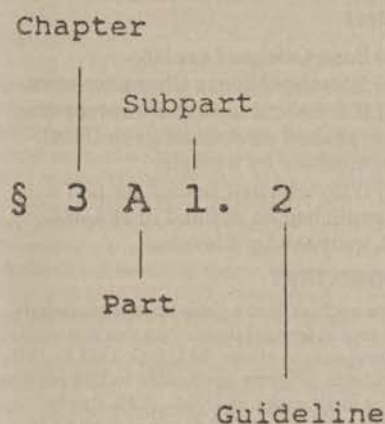
some other offense (e.g., "2 plus the offense level applicable to any underlying offense"), the offense level for the underlying offense should be determined as prescribed in this section, adding the base offense level and the applicable specific offense characteristics for the underlying offense. The additional offense levels would be added to this number.

#### Structure of the Guidelines

The guidelines are presented in numbered chapters divided into alphabetical parts. The parts are divided into sections and individual guidelines. Each guideline is identified by three numbers and a letter corresponding to the chapter, part, section and individual guideline.

The first number is the chapter, the letter represents the part of the chapter, the second number is the section, and the final number is the guideline. Section 2B1.1, for example, is the first guideline in the first section in Part B of Chapter Two. Or, § 3A1.2 is the second guideline in the first section in Part A of Chapter Three. Policy statements are similarly identified.

To illustrate:



A commentary is provided within sections to explain the guideline in greater detail or to inform the reader of statutory provisions governing the subject matter. Commentary also explains policy decisions made by the Commission in formulating the guidelines.

## CHAPTER TWO—OFFENSE CONDUCT

### Part A—Offenses Against the Person

#### 1. Homicide

- 18 U.S.C. 113(a)
- 18 U.S.C. 115
- 18 U.S.C. 351
- 18 U.S.C. 1111–1112
- 18 U.S.C. 1114
- 18 U.S.C. 1116

- 18 U.S.C. 1153
- 18 U.S.C. 1751
- 18 U.S.C. 1952A

#### § 2A1.1. First Degree Murder

(a) Base Offense Level: 43.

#### § 2A1.2. Second Degree Murder

(a) Base Offense Level: 33.

#### § 2A1.3. Voluntary Manslaughter

(a) Base Offense Level: 25.

#### § 2A1.4. Involuntary Manslaughter

(a) Base Offense Level:

- (1) 10, if the conduct was criminally negligent; or
- (2) 14, if the conduct was reckless.

#### COMMENTARY

§ 2A1.1 (18 U.S.C. 1111). The Commission has concluded that, in the absence of capital punishment, life imprisonment is the appropriate punishment for the "willful, deliberate, malicious, and premeditated killing" to which 18 U.S.C. 1111 applies.

The same statute also applies when death results from certain enumerated felonies—arson, escape, murder, kidnapping, treason, espionage, sabotage, rape, burglary or robbery. Life imprisonment is not necessarily appropriate in all such situations. For example, if in robbing a bank, the defendant merely passed a note to the teller, as a result of which she had a heart attack and died, a sentence of life imprisonment clearly would be inappropriate. If the defendant did not cause death intentionally or knowingly, the court may depart. The extent of the departure should be based upon the defendant's state of mind (e.g., recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, the Commission does not envision that departure below that specified in § 2A1.2 (Second Degree Murder) is likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.

§ 2A1.2 (18 U.S.C. 1111). Second degree murder is subject to a penalty of imprisonment for any term of years or for life.

§ 2A1.3 (18 U.S.C. 1112). The statutory recognition that voluntary manslaughter should not be punished as severely as murder is reflected in the lower base offense level. The maximum penalty for voluntary manslaughter is ten years' imprisonment.

§ 2A1.4 (18 U.S.C. 1112). The federal statute for involuntary manslaughter provides no distinction between reckless and criminally (i.e., grossly) negligent homicide. Recognizing the difference in conduct, the guideline sets the offense level for criminally negligent homicide at 10 and reckless homicide at 14. The Commission recommends a sentence at level 14 when a homicide results from driving while intoxicated.

#### 2. Assault

- 18 U.S.C. 111–115

- 18 U.S.C. 351
- 18 U.S.C. 1113–1114
- 18 U.S.C. 1116–1117
- 18 U.S.C. 1153
- 18 U.S.C. 1751

#### § 2A2.1. Assault With Intent To Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder

(a) Base Offense Level: 20.

(b) Specific Offense Characteristics.

(1) If an assault involved more than minimal planning, increase by 2 levels.

(2) (A) If a firearm was discharged, increase by 5 levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by 4 levels; (C) if a firearm or other dangerous weapon was brandished or its use was threatened, increase by 3 levels.

(3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

Degree of bodily injury	Increase in level
-------------------------	-------------------

- |  |        |
|--|--------|
| (A) Bodily Injury .....                          | Add 2. |
| (B) Serious Bodily Injury .....                  | Add 4. |
| (C) Permanent or Life-Threatening Bodily Injury. | Add 6. |

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 9 levels.

(4) If a conspiracy or assault was motivated by a payment or offer of money or other thing of value, increase by 2 levels.

#### § 2A2.2. Aggravated Assault

(a) Base Offense Level: 15.

(b) Specific Offense Characteristics.

(1) If the assault involved more than minimal planning, increase by 2 levels.

(2) (A) If a firearm was discharged, increase by 5 levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by 4 levels; (C) if a firearm or other dangerous weapon was brandished or its use was threatened, increase by 3 levels.

(3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

Degree of bodily injury	Increase in level
-------------------------	-------------------

- |  |        |
|--|--------|
| (A) Bodily Injury .....                          | Add 2. |
| (B) Serious Bodily Injury .....                  | Add 4. |
| (C) Permanent or Life-Threatening Bodily Injury. | Add 6. |

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 9 levels.

(4) If the assault was motivated by a payment or offer of money or other thing of value, increase by 2 levels.

#### § 2A2.3. Minor Assault

(a) Base Offense Level:

- (1) 6, if the conduct involved striking, beating, or wounding; or
- (2) 3, otherwise.

#### COMMENTARY

There are a number of federal provisions that address varying degrees of assault and battery. The punishments under these statutes differ considerably, even among provisions directed to substantially similar defendant conduct. For example, if the assault is upon certain federal officers "while engaged in or on account of . . . official duties," the maximum term of imprisonment under 18 U.S.C. 111 is three years. If a dangerous weapon is used in the assault on a federal officer, the maximum sentence is ten years. However, if the same weapon is used to assault a person not otherwise specifically protected, the maximum sentence under 18 U.S.C. 113(c) is five years. If the assault results in serious bodily injury, the maximum sentence under 18 U.S.C. 113(f) is ten years, unless the injury constitutes maiming by scalding, corrosive, or caustic substances under 18 U.S.C. 114, in which case the maximum term of imprisonment is twenty years. Assault with intent to commit murder carries various maximum penalties and is covered by § 2A2.1. Assault with intent to commit rape is covered under § 2A3.1.

Definitions applicable to the assault section are found at 18 U.S.C. 111, 113, 115, and 2245, except definitions for bodily injury. For convictions under the Assimilative Crimes Act, it is the nature of the conduct that is relevant. The federal code provides broad descriptions that encompass the variety of terms different jurisdictions use to describe similar conduct. Definitions of various degrees of bodily injury are found in different parts of the federal code, see 18 U.S.C. 1365(g) (3), (4); 18 U.S.C. 1515(5); 21 U.S.C. 802(25), as amended, as well as under the parole guidelines. For sentencing purposes the levels of bodily injury are:

**1. Permanent or Life-Threatening Bodily Injury.** Permanent or life-threatening bodily injury means injury causing a substantial risk of death, major disability, impairment, loss of a bodily function or significant disfigurement that is likely to be permanent.

**2. Serious Bodily Injury.** Serious bodily injury means injury causing extreme pain, substantial impairment of a bodily function or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.

**3. Bodily Injury.** Bodily injury means any other significant physical injury.

§ 2A2.1 (18 U.S.C. 113(a), 351 (c), (d), 373, 1113, 1116(a), 1117, 1751 (c), (d), 1952A(a)). This section applies to the offenses of assault with intent to commit murder, conspiracy to commit murder, solicitation to commit murder, and attempted murder.

Conspiratorial conduct proscribed by 18 U.S.C. 1117 allows for a statutory maximum sentence of life imprisonment. Solicitation to

commit murder is proscribed by 18 U.S.C. 373, a provision that generally punishes solicitation to commit a crime of violence, defined as "conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against the person or property of another in violation of the laws of the United States." The maximum sentence of imprisonment under this statute is one-half the maximum term for the crime solicited; or twenty years if the punishment for the crime solicited is death.

The statutes that prohibit attempted murder, or assaults with intent to commit murder, vary widely in the punishment they impose. Assault with intent to commit murder, 18 U.S.C. 113(a), carries a maximum sentence of twenty years' imprisonment. An attempted assassination of certain essential government officials, 18 U.S.C. 351(c), carries a maximum sentence of life. An attempted murder of foreign officials, 18 U.S.C. 1116(a), carries a maximum sentence of twenty years. An attempt to commit murder, absent an assault, 18 U.S.C. 113(a), carries a maximum sentence of three years' imprisonment. 18 U.S.C. 1113.

The aggravating factors are planning, weapon use, injury, and commission of the crime for hire. All of the factors can apply in the case of an assault; only the last can apply in the case of a conspiracy that does not include an assault; and none can apply in the case of a mere solicitation.

§ 2A2.2 (18 U.S.C. 111, 112, 113 (b), (c), (f), 114, 115 (a), (b)(1), 351(e), 1751(e)). This section applies to serious (aggravated) assaults where there is no intent to kill. Although rare, such offenses may involve planning or be committed for hire. Consequently, the structure follows § 2A2.1.

§ 2A2.3 (18 U.S.C. 111, 112, 113(d), 113(e), 115 (a), (b)(1), 351(e), 1751(e)). Simple assault and simple battery are considered under this section. The base offense level for simple assault is the statutory maximum penalty for the least serious assault, 18 U.S.C. 113(e). The additional penalty for striking, beating, or wounding reflects a statutory distinction that provides a maximum six-month term of imprisonment. 18 U.S.C. 113(d).

#### 3. Criminal Sexual Abuse

18 U.S.C. 113(a)

18 U.S.C. 1153

18 U.S.C. 2031-2032

18 U.S.C. 2241-2245

#### § 2A3.1. Criminal Sexual Abuse; Attempt or Assault With the Intent To Commit Criminal Sexual Abuse

(a) Base Offense Level: 27.

(b) Specific Offense Characteristics.

(1) If the criminal sexual abuse was accomplished as defined in 18 U.S.C. 2241 (including, but not limited to, the use or display of any dangerous weapon), increase by 4 levels.

(2)(A) If the victim had not attained the age of twelve years, increase by 4 levels; otherwise, (B) if the victim was under the age of sixteen, increase by 2 levels.

(3) If the victim was in the custody, care, or supervisory control of the defendant, was a corrections employee, or a person held in the custody of a correctional facility, increase by 2 levels.

(4)(A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels.

(5) If the victim was abducted, increase by 4 levels.

#### § 2A3.2. Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt To Commit Such Acts

(a) Base Offense Level: 15.

(b) Specific Offense Characteristics.

(1) If the victim was in the custody, care, or supervisory control of the defendant, increase by 1 level.

#### § 2A3.3. Criminal Sexual Abuse of a Ward (Statutory Rape) or Attempt To Commit Such Acts

(a) Base Offense Level: 9.

#### § 2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

(a) Base Offense Level: 6.

(b) Specific Offense Characteristics.

(1) If the abusive sexual contact was accomplished as defined in 18 U.S.C. 2241, increase by 9 levels.

(2) If the abusive sexual contact was accomplished as defined in 18 U.S.C. 2242, increase by 4 levels.

#### COMMENTARY

This section of the guidelines is modeled after recent federal legislation dealing with criminal sexual abuse, 18 U.S.C. 2241 to 2245. Definitions of terms applicable to this section are set forth under 18 U.S.C. 2245. Apply §§ 2A3.2, 2A3.3, or 2A3.4 only if § 2A3.1 is not applicable.

§ 2A3.1 (18 U.S.C. 2241-2242). Sexual offenses addressed in this section are crimes of violence. Because of their dangerousness, attempts are treated the same as completed acts of criminal sexual abuse. The statutory maximum penalty is any term of years or life imprisonment. The base offense level represents sexual abuse as set forth in 18 U.S.C. 2242. The enhancement for use of force, threat of death, serious bodily injury, kidnapping, or criminal sexual abuse by other means is defined in 18 U.S.C. 2241. This is intended to include any use or threatened use of a dangerous weapon.

One of the important distinctions Congress has made under the new legislation involves the victimization of children under age twelve, 18 U.S.C. 2241. Any criminal sexual abuse, including statutory rape, with children under twelve is punished more seriously than in the past and for sentencing purposes is governed by § 2A3.1. An enhancement for this age distinction is provided.

An enhancement for a custodial relationship between defendant and victim is warranted in cases of criminal sexual abuse. Whether the custodial relationship is temporary or permanent, the defendant in such a case is a person the victim trusts or to whom the victim is entrusted. This sentencing aggravation represents the potential for greater and prolonged psychological damage. An enhancement is also provided for physical injury.

§ 2A3.2 (18 U.S.C. 2243). This section applies to statutory rape, i.e., sexual acts that would be lawful but for the victim's incapacity to give lawful consent. It is assumed that a four-year age difference exists between the victim and the defendant, as is specified by statute. 18 U.S.C. 2243. The statutory maximum penalty is five years' imprisonment. An enhancement is provided for defendants who victimize minors under their supervision or care.

If the defendant committed the criminal sexual act in furtherance of a commercial sex scheme such as pandering, transporting prostitutes, or pornographic materials, the court may depart from the guideline and impose a higher sentence.

§ 2A3.3 (18 U.S.C. 2243). Under the new legislation, wards have been placed in the category of persons unable to consent to sexual acts. A ward is a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant. The statutory maximum penalty is one year imprisonment.

§ 2A3.4 (18 U.S.C. 2244-2245). The distinction between sexual act and sexual contact is provided by statute. 18 U.S.C. 2245. The base offense level includes abusive sexual contact with a minor or ward and any abusive sexual contact with other adults not included under 18 U.S.C. 2244(a)(1) and 2244(a)(2). The maximum penalty for these offenses is six months' imprisonment. The enhancement for force, threat, or other means defined in 18 U.S.C. 2241 results from a five-year increase in the statutory maximum penalty. The enhancement for victims who are incapable of appraising the nature of their conduct or who are physically incapable of resisting is provided through statutory increase of the maximum penalty to three years.

#### 4. Kidnapping, Abduction, or Unlawful Restraint

18 U.S.C. 115  
18 U.S.C. 351  
18 U.S.C. 876-877  
18 U.S.C. 1201-1203  
18 U.S.C. 1751

#### § 2A4.1. Kidnapping, Abduction, Unlawful Restraint

- (a) Base Offense Level: 24.
- (b) Specific Offense Characteristics.
  - (1) If a ransom demand or a demand upon government was made, increase by 6 levels.
  - (2)(A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels.

(3) If a dangerous weapon was used, increase by 2 levels.

(4)(A) If the victim was not released voluntarily before thirty days had elapsed, increase by 2 levels.

(B) If the victim was not released voluntarily before seven days had elapsed, increase by 1 level.

(C) If the victim was released voluntarily before twenty-four hours had elapsed, decrease by 1 level.

(5) If the victim was kidnapped, abducted, or unlawfully restrained to facilitate the commission of another offense: (A) Increase by 4 levels; or (B) if the result of applying this guideline is less than that resulting from application of the guideline for such other offense, apply the guideline for such other offense.

#### § 2A4.2. Demanding or Receiving Ransom Money

(a) Base Offense Level: 23.

#### COMMENTARY

§ 2A4.1 (18 U.S.C. 115(b)(2), 351 (b), (d), 1201, 1203, 1751(b)). Federal kidnapping cases generally encompass three categories of conduct: limited duration kidnapping where the victim is released unharmed; kidnapping that occurs as part of or to facilitate the commission of another offense (often, sexual assault); and kidnapping for ransom or political demand. The base offense level reflects the limited duration kidnappings and enhancements provide for the other two.

An enhancement is provided when the offense is committed for ransom or to facilitate the commission of another offense. Should the application of this guideline result in a penalty less than the result achieved by applying the guideline for the underlying offense, apply the guideline for the underlying offense (e.g., § 2A3.1, Criminal Sexual Abuse).

§ 2A4.2 (18 U.S.C. 876-877, 1202). This section specifically includes conduct prohibited by 18 U.S.C. 1202, requiring that ransom money be received, possessed, or disposed of with knowledge of its criminal origins. The actual demand for ransom under these circumstances is reflected in § 2A4.1. The statutory maximum for this offense is ten years. This section additionally includes extortionate demands through the use of the United States Postal Service, behavior proscribed by 18 U.S.C. 876-877, where the statutory maximum penalty is twenty years.

#### 5. Air Piracy

49 U.S.C. 1472 (c), (i), (j), (l), (n)

#### § 2A5.1. Aircraft Piracy or Attempted Aircraft Piracy

- (a) Base Offense Level: 38.
- (b) Specific Offense Characteristics.
  - (1) If death resulted, increase by 5 levels.

#### § 2A5.2. Interference With Flight Crew Member or Flight Attendant

(a) Base Offense Level (Apply the greatest):

- (1) 30, if the defendant intentionally endangered the safety of the aircraft and passengers; or
- (2) 18, if the defendant recklessly endangered the safety of the aircraft and passengers; or
- (3) If an assault occurred, the offense level from the most analogous assault guideline, §§ 2A2.1-2A2.4; or
- (4) 9.

#### COMMENTARY

§ 2A5.1 (49 U.S.C. 1472 (i), (n)). This section covers aircraft piracy both within the special aircraft jurisdiction of the United States, 49 U.S.C. 1472(i), and aircraft piracy outside that jurisdiction when the defendant is later found in the United States, 49 U.S.C. 1472(n). Both of these offenses carry a mandatory minimum sentence of twenty years' imprisonment. Seizure of control of an aircraft may be by force or violence, or threat of force or violence, or by any other form of intimidation. The presence of a weapon is considered in the base offense level.

§ 2A5.2 (49 U.S.C. 1472 (c), (j)). Endangerment to the aircraft and passengers represents behavior deserving of greater penalty. If an assault occurs, the most analogous assault guideline applies. The statutory maximum of twenty years' imprisonment allows for a wide range of conduct.

Carrying a weapon or explosive aboard an aircraft is behavior proscribed by 49 U.S.C. 1472(l). This offense is covered in § 2K1.5 (Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft).

#### 6. Threatening Communications

#### § 2A6.1. Threatening Communications

- (a) Base Offense Level: 12.
- (b) Specific Offense Characteristics.
  - (1) If the defendant engaged in any conduct evidencing an intent to carry out such threat, increase by 6 levels.
  - (2) If specific offense characteristic § 2A6.1(b)(1) does not apply, and the defendant's conduct involved a single instance evidencing little or no deliberation, decrease by 4 levels.

#### COMMENTARY

§ 2A6.1 (18 U.S.C. 871, 876, 877, 878(a), 879). These statutes cover a wide range of conduct from an offhand threat to injure the President made while under the influence of alcohol, to a deliberate effort to instill fear, to a threat associated with other conduct evidencing an intent to carry out such threat. The specific offense characteristics are intended to distinguish the cases described above. The Commission recognizes that it is not possible to cover all of the characteristics associated with this offense. For example, the background and mental condition of the defendant, and the nature of any objective conduct associated with the threat is likely to

be of particular significance. The Commission intends that such factors be considered by the court in determining whether a departure from the guidelines is warranted.

## Part B—Offenses Involving Property

### 1. Theft, Embezzlement, Receipt of Stolen Property, and Property Destruction

- 18 U.S.C. 553(a)(1)
- 18 U.S.C. 641
- 18 U.S.C. 656-657
- 18 U.S.C. 659
- 18 U.S.C. 661
- 18 U.S.C. 1361-1363
- 18 U.S.C. 1700-1701
- 18 U.S.C. 1703
- 18 U.S.C. 1705-1708
- 18 U.S.C. 2113(b)
- 18 U.S.C. 2312-2317

#### § 2B1.1. Larceny, Embezzlement, and Other Forms of Theft

- (a) Base Offense Level: 4.
- (b) Specific Offense Characteristics.
- (1) If the value of the property taken exceeded \$100, increase the offense level as follows:

Loss	Increase in level
(A) \$100 or less .....	No increase.
(B) \$101 to \$1,000 .....	add 1.
(C) \$1,001 to \$2,000 .....	add 2.
(D) \$2,001 to \$5,000 .....	add 3.
(E) \$5,001 to \$10,000 .....	add 4.
(F) \$10,001 to \$20,000 .....	add 5.
(G) \$20,001 to \$50,000 .....	add 6.
(H) \$50,001 to \$100,000 .....	add 7.
(I) \$100,001 to \$200,000 .....	add 8.
(J) \$200,001 to \$500,000 .....	add 9.
(K) \$500,001 to \$1,000,000 .....	add 10.
(L) \$1,000,001 to \$2,000,000 .....	add 11.
(M) \$2,000,001 to \$5,000,000 .....	add 12.
(N) over \$5,000,000 .....	add 13.

(2) If a firearm, destructive device, or controlled substance was taken, increase by 1 level; but if the resulting offense level is less than 7, increase to level 7.

(3) If the theft was from the person of another, increase by 2 levels.

(4) If the offense involved more than minimal planning, increase by 2 levels.

(5) If undelivered United States mail was taken, and the offense level as determined above is less than level 6, increase to level 6.

(6) If the offense involved organized criminal activity, and the offense level as determined above is less than level 14, increase to level 14.

#### § 2B1.2. Receiving Stolen Property

- (a) Base Offense Level: 4.
- (b) Specific Offense Characteristics.
- (1) If the value of the property taken exceeded \$100, increase by the

corresponding number of levels from the table in § 2B1.1.

(2)(A) If the offense was committed by a person in the business of selling stolen property, increase by 4 levels; or

(B) If the offense involved more than minimal planning, increase by 2 levels.

(3) If the property included a firearm, destructive device, or controlled substance, increase by 1 level; but if the resulting offense level is less than 7, increase to 7.

(4) If the offense involved organized criminal activity, and the offense level as determined above is less than level 14, increase to level 14.

#### § 2B1.3. Property Damage or Destruction (Other than by Arson or Explosives)

- (a) Base Offense Level: 4.
- (b) Specific Offense Characteristics.
- (1) If the amount of the property damage or destruction, or the cost of restoration, exceeded \$100, increase by the corresponding number of levels from the table in § 2B1.1.

(2) If the offense involved more than minimal planning, increase by 2 levels.

(3) If undelivered United States mail was destroyed, and the offense level as determined above is less than level 6, increase to level 6.

#### COMMENTARY

These sections address the most basic forms of property offenses: Theft, embezzlement, transactions in stolen goods, and simple property damage or destruction. (Arson is dealt with separately in Part K, Offenses Involving Public Order and Safety.) These guidelines apply to offenses prosecuted under a wide variety of federal statutes, as well as offenses that arise under the Assimilated Crimes Act.

§ 2B1.1. This section applies to theft and embezzlement offenses in violation of 18 U.S.C. §§ 641, 656, 657, 659, 1702, 1708, 2113(b), and 2312 through 2317. Larceny and embezzlement are both forms of theft and are often covered by the same statutes.

The value of property taken plays an important role in determining sentences for theft and embezzlement offenses, since it is an indicator of both the harm to the victim and the gain to the defendant. The property table provides an enhancement based on the loss from theft. Value is determined by the replacement cost to the victim, or the market value of the property, whichever is greater. The loss includes any unauthorized charges made with stolen credit cards, but in no event less than \$100 per card. Controlled substances are to be valued at their street value. The loss need not be determined with precision, and may be inferred from any reliable information, available including the apparent scope of the operation.

Consistent with statutory distinctions, the minimum offense level is provided for the theft of undelivered mail. Theft of undelivered mail interferes with a governmental function, and the scope of the theft may be difficult to ascertain.

An enhancement is also included for planning. This denotes actions that distinguish an impulse crime from one that involves more than the minimal amount of planning that is usual for the type of offense committed. Any series of thefts that are part of a scheme or pattern is deemed to involve more than minimal planning. Planning and repeated acts are indicative of an intention and potential to do considerable harm. Also, planning is often related to increased difficulties of detection and proof. This adjustment is not intended to apply to simple efforts to cover up or conceal commission of the offense.

Studies show that stolen firearms are used disproportionately in the commission of crimes. The guideline provides an enhancement for theft of a firearm to ensure that some amount of imprisonment is required. An enhancement is provided when controlled substances are taken. Such thefts may involve a greater risk of violence, as well as a likelihood that the substance will be abused.

Theft from the person of another (including thefts from the immediate presence of the victim), such as pickpocketing or nonforcible purse-snatching, receive an enhanced sentence because of the increased risk. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies.

A minimum offense level of 14 is provided for organized criminal activity. This is designed for operations such as organized car theft rings, or "chop shops," where the scope of the activity is clearly significant but difficult to estimate. Of course, if reliable information enables the court to estimate a volume of property loss that would result in a higher offense level, the court should employ the higher offense level.

§ 2B1.2. This guideline applies to 18 U.S.C. 553(a)(1), 659, 662, 1708, and 2312 through 2317. Receiving stolen property is treated much like theft. Receiving stolen property for resale receives an enhancement because the amount of property is likely to underrepresent the scope of the offense. If the defendant is convicted of transporting stolen property, either § 2B1.1 or this guideline would apply, depending on whether the defendant actually stole the property.

§ 2B1.3. This section addresses violations of 18 U.S.C. §§ 1361 through 1363, 1702, and 1703, involving vandalism or malicious mischief, as well as destruction of mail. Arson is treated in Part K, Offenses Involving Public Order and Safety.

In some cases involving property damage, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused. For example, the destruction of a \$500 telephone line may cause an interruption in service to thousands of people for several hours. In such instances, departure would be warranted.

#### 2. Burglary and Trespass

- 18 U.S.C. 1382
- 18 U.S.C. 1854
- 18 U.S.C. 2113(a)
- 18 U.S.C. 2115
- 18 U.S.C. 2117

## 18 U.S.C. 2118(b)

**§ 2B2.1. Burglary of a Residence**

- (a) Base Offense Level: 17.  
 (b) Specific Offense Characteristics.  
 (1) If the offense involved more than minimal planning, increase by 2 levels.  
 (2) If the value of the property taken or destroyed exceeded \$2,500, increase the offense level as follows:

Loss	Increase in level
(A) \$2,500 or less .....	No increase.
(B) \$2,501 to \$10,000 .....	Add 1.
(C) \$10,001 to \$50,000 .....	Add 2.
(D) \$50,001 to \$250,000 .....	Add 3.
(E) \$250,001 to \$1,000,000 .....	Add 4.
(F) \$1,000,001 to \$5,000,000 .....	Add 5.
(G) More than \$5,000,000 .....	Add 6.

- (3) If obtaining a firearm, destructive device, or controlled substance was an object of the offense, increase by 1 level.  
 (4) If a firearm or other dangerous weapon was possessed, increase by 2 levels.

**§ 2B2.2. Burglary of Other Structures**

- (a) Base Offense Level: 12.  
 (b) Specific Offense Characteristics.  
 (1) If the offense involved more than minimal planning, increase by 2 levels.  
 (2) If the value of the property taken or destroyed exceeded \$2,500, increase by the corresponding number of levels from the table in § 2B2.1.  
 (3) If obtaining a firearm, destructive device, or controlled substance was an object of the offense, increase by 1 level.  
 (4) If a firearm or other dangerous weapon was possessed, increase by 2 levels.

**§ 2B2.3. Trespass**

- (a) Base Offense Level: 4.  
 (b) Specific Offense Characteristic.  
 (1) If the trespass occurred at a secured government facility, a nuclear energy facility, or a residence, increase by 2 levels.  
 (2) If a firearm or other dangerous weapon was possessed, increase by 2 levels.

**COMMENTARY**

§§ 2B2.1 and 2B2.2. These sections apply to violations of 18 U.S.C. §§ 2113(a), 2115, 2117, and 2118(b). Burglary often occurs in connection with other offenses. The risk of crimes is included in the base offense level for burglary. Section 2B2.1 applies to residential burglary, where the risk of physical and psychological injury is highest. Section 2B2.2 applies to bank burglary as well as burglaries of other structures. Obtaining a weapon or controlled substance is considered to be an object of the offense if such an item was taken.

§ 2B2.3. This section applies to violations of 18 U.S.C. §§ 1382 and 1854. Most

trespasses punishable under federal law involve federal lands or property. The trespass section provides an enhancement for offenses involving trespass on secured government installations, such as nuclear facilities, to protect a significant federal interest. Additionally, an enhancement is provided for trespass at a residence.

**3. Robbery, Extortion, and Blackmail**

- 18 U.S.C. 873  
 18 U.S.C. 875-877  
 18 U.S.C. 1951  
 18 U.S.C. 2113-2114  
 18 U.S.C. 2118(a)

**§ 2B3.1. Robbery**

- (a) Base Offense Level: 18.  
 (b) Specific Offense Characteristics.  
 (1) If the value of the property taken or destroyed exceeded \$2,500, increase the offense level as follows:

Loss	Increase in level
(A) \$2,500 or less .....	No increase.
(B) \$2,501 to \$10,000 .....	Add 1.
(C) \$10,001 to \$50,000 .....	Add 2.
(D) \$50,001 to \$250,000 .....	Add 3.
(E) \$250,001 to \$1,000,000 .....	Add 4.
(F) \$1,000,000 to \$5,000,000 .....	Add 5.
(G) More than \$5,000,000 .....	Add 6.

Treat the loss for a financial institution or post office as at least \$5,000.

- (2)(A) If a firearm was discharged increase by 5 levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by 4 levels; (C) if a firearm or other dangerous weapon was possessed, increase by 3 levels.

- (3) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

Degree of bodily injury	Increase in level
(A) Bodily injury .....	Add 2.
(B) Serious bodily injury .....	Add 4.
(C) Permanent or life-threatening bodily injury.	Add 6.

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 9 levels.

- (4)(A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) if person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.

- (5) If obtaining a firearm, destructive device, or controlled substance was the object of the offense, increase by 1 level.

**COMMENTARY**

§ 2B3.1. This section applies to violations of 18 U.S.C. §§ 1951, 2113, 2114, and 2118(a). Possession or use of a weapon, physical injury, and unlawful restraint sometimes occur during a robbery. The guideline

provides for a range of enhancements where these factors are present. Banks and post offices carry a minimum 1 level enhancement for property loss because such institutions generally have more cash readily available, and whether the defendant obtains more or less than \$2,500 is largely fortuitous.

Obtaining drugs or other controlled substances is often the motive for robberies of a Veterans Administration Hospital, a pharmacy on a military base, or a similar facility. A specific offense characteristic is added for robberies where drugs or weapons were the object of the offense to take account of the dangers and security problems involved when such items are taken.

Although in current practice the amount of money taken in robbery cases appears to affect sentence length, its importance is small compared to that of the other harm involved. Moreover, because of the relatively high base offense level for robbery, an increase of 1 or 2 levels brings about a considerable increase in sentence length in absolute terms.

Accordingly, a separate property table, which increases more slowly than that used in theft offenses, is utilized.

The enhancements for physical injury are meant to be suggestive only. If the degree of injury lies between permanent and serious, or between serious and bodily injury, the sentencing judge may interpolate to find the appropriate enhancement amount. The guideline provides an enhancement for robberies where a victim (A) was forced to accompany the defendant to another location; or (B) was forcibly restrained by being tied, bound, or locked up.

If the defendant was convicted under 18 U.S.C. § 2113(e) and in committing the offense or attempting to flee or escape, a participant killed any person, apply § 2A1.1 (First Degree Murder). Otherwise, if death results, see Chapter Five, Part K (Departures).

The adjustments for weapon use and injury assume that, as is typical in a robbery, the defendant did not actually intend to murder the victim. If there was such intent, see § 2A2.1, (Assault With Intent to Commit Murder).

**§ 2B3.2. Extortion by Force or Threat of Injury or Serious Damage**

- (a) Base Offense Level: 18.  
 (b) Specific Offense Characteristics.  
 (1) If the greater of the amount obtained or demanded exceeded \$2,500, increase by the corresponding number of levels from the table in § 2B3.1.  
 (2)(A) If a firearm was discharged, increase by 5 levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by 4 levels; (C) if a firearm or other dangerous weapon was possessed, increase by 3 levels.

- (3) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

Degree of bodily injury	Increase in level
(A) Bodily injury .....	Add 2.
(B) Serious bodily injury .....	Add 4.
(C) Permanent or life-threatening bodily injury.	Add 6.

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 9 levels.

(4)(A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.

#### § 2B3.3. Blackmail and Similar Forms of Extortion

(a) Base Offense Level: 9.

(b) Specific Offense Characteristics.

(1) If the greater of the amount obtained or demanded exceeded \$2,000, increase by the corresponding number of levels from the table in § 2F1.1.

#### COMMENTARY

§ 2B3.2. This section applies to extortion involving express or implied threats to kill, kidnap, or physically injure a person, or to seriously damage a property interest, in violation of 18 U.S.C. 873, 875(b), 876, 877, and 1951 (the Hobbs Act). The Hobbs Act prohibits extortion, attempted extortion, and conspiracy to extort, and provides for up to twenty years' imprisonment for violations.

This guideline applies if there was any threat, express or implied, that reasonably could be interpreted as one to injure a person or physically damage property, or any comparably serious threat, such as to drive an enterprise out of business. Even if the threat does not in itself imply violence, the possibility of violence or serious adverse consequences may be inferred from the circumstances of the threat or the reputation of the person making it. An ambiguous threat, such as "pay up or else," or a threat to cause labor problems, ordinarily should be treated under this section.

Violations of 18 U.S.C. 875-877 are distinguished only by the method of communication of the extortionate demand. The maximum penalty under each statute varies from two to twenty years. Violations of 18 U.S.C. 875 involve threats or demands transmitted by interstate commerce. Violations of 18 U.S.C. 876 involve the use of the United States mails to communicate threats, while violations of § 877 involve mailing threatening communications from foreign countries.

Guidelines for extortion and bribery involving public officials are found in Part C, Offenses Involving Public Officials. Extortion under color of official right is covered under § 2C1.1 unless there is use of force or a threat that qualifies for treatment under this section. Certain other extortion offenses are covered under the provisions of Part E, Offenses Involving Criminal Enterprise.

§ 2B3.3. This section applies only to blackmail and similar forms of extortion where there clearly is no threat of violence to person or property. "Blackmail" is defined as a threat to disclose a violation of United States law unless money or some other item of value is given. It is proscribed by 18 U.S.C. 873, which provides for a maximum one-year term of imprisonment. Extortionate threats to injure a reputation, or other threats that are less serious than those covered by § 2B3.2, may also be prosecuted under 18 U.S.C. 875-877.

#### 4. Commercial Bribery and Kickbacks

15 U.S.C. 78dd-1, 78dd-2

15 U.S.C. 78ff

18 U.S.C. 215

18 U.S.C. 224

18 U.S.C. 1954

26 U.S.C. 9012(e)

26 U.S.C. 9042(d)

41 U.S.C. 51-54

42 U.S.C. 1395nn(b) (1), (2)

42 U.S.C. 1396h(b) (1), (2)

49 U.S.C. 11904

49 U.S.C. 11907 (a), (b)

#### § 2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery

(a) Base Offense Level: 8.

(b) Specific Offense Characteristic.

(1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1.

#### COMMENTARY

§ 2B4.1. This section applies to violations of 15 U.S.C. 78dd-1, 78dd-2; 18 U.S.C. 215, 224, and 1954; 26 U.S.C. 9012(e), 9042(d); 41 U.S.C. 51-54; 42 U.S.C. 1395nn(b) (1), (2), 1396h(b) (1), (2); 49 U.S.C. 11904, and 49 U.S.C. 11907 (a), (b). This guideline covers commercial bribery offenses and kickbacks that do not involve officials of federal, state, or local government. See Part C, Offenses Involving Public Officials.

The guideline directs the use of the property table at § 2F1.1 to aggravate the offense level. The amount to be used is the greater of the value of the bribe, or the improper benefit of the action to be taken or effected in return for the bribe, if the value can reasonably be ascertained. If the amount of the benefit cannot be ascertained, the court should apply at least the amount of the bribe. For example, if a bank officer agreed to the offer of a \$25,000 bribe to approve a \$250,000 loan under terms for which the applicant would not otherwise qualify, aggravation of the base offense level from the property table would provide for imposing a sentence based on the greater of the \$25,000 bribe, or the savings in interest over the life of the loan compared with alternative loan terms. If, in another instance, a gambler paid a player \$5,000 to shave points in a nationally televised basketball game, the value of the action to the gambler is the amount the

gambler and the gambler's confederates won or stood to gain. If that amount cannot be estimated, the amount of the bribe is used to determine the appropriate increase in offense level from the property table.

Section 2B4.1 applies to violations of various federal bribery statutes, most of which authorize a maximum term of imprisonment of five years. 18 U.S.C. 215 prohibits the offer or acceptance of a fee in connection with the procurement of a loan from a financial institution. The base offense level is to be enhanced by application of the property table, based upon the value of the unlawful payment or the value of the action to be taken or effected in return for the unlawful payment, whichever is greater.

Congress recently increased the maximum term of imprisonment for making prohibited payments to induce the award of subcontracts on federal projects from two to ten years. 41 U.S.C. 51-54. Violations of 42 U.S.C. 1395nn (b)(1) and (b)(2), involve the offer or acceptance of a payment to refer an individual for services or items paid for under the Medicare program. Similar provisions in 42 U.S.C. 1396h (b)(1) and (b)(2) cover the offer or acceptance of a payment for referral to the Medicaid program.

The guideline also relates to violations of law involving bribes and kickbacks in expenses incurred for a presidential nominating convention or presidential election campaign. These offenses are prohibited under 26 U.S.C. 9012(e) and 9042(d), which apply to candidates for President and Vice President whose campaigns are eligible for federal matching funds.

This section also applies to violations of the Foreign Corrupt Practices Act, 15 U.S.C. 77d-1 and 77d-2, and to violations of 18 U.S.C. 224, sports bribery, as well as certain violations of the Interstate Commerce Act that carry a maximum of two years' imprisonment.

#### 5. Counterfeiting

17 U.S.C. 506(a)

18 U.S.C. 471-473

18 U.S.C. 495

18 U.S.C. 500-501

18 U.S.C. 510

18 U.S.C. 1003

18 U.S.C. 2314-2315

18 U.S.C. 2318-2320

#### § 2B5.1. Offenses Involving Counterfeit Obligations of the United States

(a) Base Offense Level: 9.

(b) Specific Offense Characteristics.

(1) If the face value of the counterfeit items exceeded \$2,000, increase by the corresponding number of levels from the table at § 2F1.1.

(2) If the defendant manufactured or produced any counterfeit obligation or security of the United States, or possessed or had custody of or control over a counterfeiting device or materials used for counterfeiting, and the offense level as determined above is less than 15, increase to 15.

**§ 2B5.2. Forgery; Offenses Involving Counterfeit Instruments Other Than Obligations of the United States**

Apply § 2F1.1.

**§ 2B5.3. Criminal Infringement of Copyright**

(a) Base Offense Level: 6.

(b) Specific Offense Characteristic.

(1) If the retail value of the infringing items exceeded \$2,000, increase by the corresponding number of levels from the table in § 2F1.1.

**§ 2B5.4. Criminal Infringement of Trademark**

(a) Base Offense Level: 6.

(b) Specific Offense Characteristic.

(1) If the retail value of the infringing items exceeded \$2,000, increase by the corresponding number of levels from the table in § 2F1.1.

**COMMENTARY**

§ 2B5.1. This section applies to violations of 18 U.S.C. 471-473, 500, 501, 510, 1003, 2314, and 2315. These offenses involve counterfeiting or passing of counterfeit items. Federal law protects a variety of items from counterfeiting, including United States currency and coins, food stamps, postage stamps, foreign bank notes, labels for phonograph records, and military discharge papers.

Possession of counterfeiting devices to copy obligations and securities of the United States is treated as an aggravated form of counterfeiting because of the sophistication and planning involved in manufacturing counterfeit obligations or securities and the public policy interest in protecting the integrity of government obligations. Similarly, an enhancement is provided for a defendant who produces, rather than merely passes, the counterfeit items. The enhancement, however, is not intended to apply to someone who merely connects pieces of different notes.

§ 2B5.2. Forgery and fraudulent endorsement in violation of 18 U.S.C. 495 is covered in § 2F1.1.

§ 2B5.3. This section applies to violations of 17 U.S.C. 506(a) punished under 18 U.S.C. 2319, as well as certain violations of 18 U.S.C. 2511 as amended by the Electronic Communications Act of 1986. The amendments provide for a maximum term of imprisonment of five years for violations involving the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are essentially property offenses.

§ 2B5.4. This section applies to criminal infringement of trademarks in violation of 18 U.S.C. 2318 and 2320.

**6. Motor Vehicle Identification Numbers**

18 U.S.C. 511

18 U.S.C. 553(a)(2)

18 U.S.C. 2320

**§ 2B6.1. Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts With Altered or Obliterated Identification Numbers**

(a) Base Offense Level: 8.

(b) Specific Offense Characteristic.

(1) If the retail value of the motor vehicles or parts involved exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1.

(2) If the offense involved organized criminal activity, and the offense level as determined above is less than level 14, increase to level 14.

**COMMENTARY**

§ 2B6.1. This section applies to violations of 18 U.S.C. 511, 553(a)(2), and 2320. The statutes prohibit altering or removing motor vehicle identification numbers, importing or exporting, or trafficking in motor vehicles or parts knowing that the identification numbers have been removed, altered, tampered with, or obliterated. Violations of 18 U.S.C. 511 and 553(a)(2) carry a maximum of five years' imprisonment. Violations of 18 U.S.C. 2320 carry a maximum of ten years' imprisonment.

See Commentary to § 2B1.1 regarding the adjustment for organized criminal activity, such as car theft rings and "chop shop" operations.

**Part C—Offenses Involving Public Officials**

18 U.S.C. 201 (b), (c), (f), (g)

18 U.S.C. 203

18 U.S.C. 205

18 U.S.C. 207-214

18 U.S.C. 217

18 U.S.C. 872

18 U.S.C. 1909

18 U.S.C. 1951

**§ 2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right**

(a) Base Offense Level: 10.

(b) Specific Offense Characteristics.

(1) Apply the greater:

(A) If the value of the bribe or the action received in return for the bribe exceeded \$2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).

(B) If the offense involved a bribe for the purpose of influencing an elected official or any official holding a high level decision-making or sensitive position, increase by 8 levels.

(c) Cross References.

(1) If the bribe was for the purpose of concealing or facilitating another criminal offense, or for obstructing justice in respect to another criminal offense, apply § 2X3.1 (Accessory After the Fact) in respect to such other criminal offense if the resulting offense level is greater than that determined above.

(2) If the offense involved a threat of physical injury or property destruction, apply § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

**§ 2C1.2. Offering, Giving, Soliciting, or Receiving a Gratuity**

(a) Base Offense Level: 7.

(b) Specific Offense Characteristics

Apply the greater:

(1) If the value of the gratuity exceeded \$2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).

(2) If the gratuity was given, or to be given, to an elected official or any official holding a high level decision-making or sensitive position, increase by 8 levels.

**§ 2C1.3. Conflict of Interest**

(a) Base Offense Level: 6.

(b) Specific Offense Characteristic.

(1) If the offense involved actual or planned harm to the government, increase by 4 levels.

**§ 2C1.4. Payment or Receipt of Unauthorized Compensation**

(a) Base Offense Level: 6.

**§ 2C1.5. Payments to Obtain Public Office**

(a) Base Offense Level: 8.

**§ 2C1.6. Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper**

(a) Base Offense Level: 8.

(b) Specific Offense Characteristic.

(1) If the value of the gratuity exceeded \$2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).

**COMMENTARY**

The Commission believes that current sentencing practices do not adequately reflect the seriousness of public corruption offenses. Therefore, these guidelines provide for sentences that are considerably higher than average current practice.

The provisions of § 3B1.3 (Abuse of Position of Trust or Special Skill) do not apply to offenses under this Part, except under § 2C1.1(c)(1). This enhancement is incorporated into the base offense level. However, other sections of Chapter Three, Part B (Role in the Offense) may apply.

Although these guidelines incorporate the amount of the bribe or gratuity as a factor, that is not the primary consideration. Consequently, when multiple counts are involved, the dollar values are not to be aggregated. Instead, each is to be treated as a separate offense subject to the rules for multiple counts in Chapter Three, Part D. Substantially higher offense levels will thus

result when there is a pattern of repeated corruption.

A conspiracy to defraud the United States, in violation of 18 U.S.C. 371, may involve corrupt activities by a public official. Corrupt activities prosecuted under the mail and wire fraud statutes, 18 U.S.C. 1341 and 1343, may involve either federal or local officials in schemes to defraud the public of its right to honest government. When the offense of conviction is the general conspiracy statute, or the mail or wire fraud statute, the court shall apply the guideline that most accurately describes the underlying offense conduct.

§ 2C1.1 (18 U.S.C. 201 (b) and (c); 18 U.S.C. 872, 1951). This section applies to a person who offers or gives a bribe for a corrupt purpose, such as inducing a public official to participate in a fraud or to influence his official actions, in violation of 18 U.S.C. 201(b), or to a public official who solicits or accepts such a bribe in violation of 18 U.S.C. 201(c). These offenses carry a maximum penalty of fifteen years. Conspiracies, solicitations, and attempts carry the same fifteen-year maximum penalty.

The object of a bribe may vary widely from case to case. In some cases, the object may be commercial advantage (e.g., preferential treatment in the award of a government contract). In others, the object may be issuance of a license to which the recipient is not entitled. In still others, the object may be the obstruction of justice.

Under § 2C1.1(b)(1)(A), the offense level is increased if the value of the bribe or the action received in return can be determined and is greater than \$2,000. For example, if a person paid a customs official \$2,000 to evade \$10,000 in duties, the value of the action received is \$10,000. The amount of the bribe is included not because it directly measures harm to society, but because it is improbable that a large bribe would be given for a favor of little consequence. Moreover, for deterrence purposes, the larger the gain, the larger the punishment must be.

Under § 2C1.1(b)(1)(B), if the bribe is for the purpose of influencing an official act by certain officials, the offense level is increased by 8 levels if this increase is greater than that provided under § 2C1.1(b)(1)(A). The term "official holding a high level decision-making or sensitive position" includes, for example, judges, prosecuting attorneys, agency administrators, supervisory police officers, and other governmental officials with similar levels of responsibility.

Under § 2C1.1(c)(1), if the purpose of the bribe involved the facilitation of another criminal offense or the obstruction of justice in respect to another criminal offense, the guideline for § 2X3.1 (Accessory After the Fact) in respect to that criminal offense will be applied, if the result is greater than that determined above. For example, if a bribe was given for the purpose of facilitating or covering up the offense of espionage, the guideline for accessory after the fact to espionage would be applied. Note that, when applying § 2X3.1, adjustments from Chapter Three, Part B (Role in the Offense) must be applied. This normally will result in an increase of at least 2 levels.

Finally, under § 2C1.1(c)(2), if the offense involved forcible extortion, the guideline from

§ 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) will apply if the result is greater than that determined above.

The Commission recognizes that in many cases the monetary value of the bribe may not be known or may not adequately reflect the seriousness of the offense. For example, a small payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes, the obstruction of justice in a major narcotics case, or a systematic or pervasive pattern of corruption of a governmental institution or office that may cause loss of public confidence in government. In part, this problem is dealt with under § 2C1.1(b)(1)(B), and §§ 2C1.1(c)(1) and (2). Where the seriousness of the offense still is not adequately reflected, a departure from the guidelines is appropriate. Furthermore, where the court finds the defendant's conduct was part of a systematic or pervasive corruption of a government function, process or office, departure from the guidelines is appropriate.

Section 2C1.1 also applies to extortion by officers or employees of the United States in violation of 18 U.S.C. 872, and Hobbs Act extortions, conspiracies, and attempts under color of official right, in violation of 18 U.S.C. 1951. The Hobbs Act, 18 U.S.C. 1951(b)(2), applies in part to any person who acts "under color of official right." This statute applies to extortionate conduct by, among others, officials and employees of state and local governments. The panoply of conduct that may be prosecuted under the Hobbs Act varies from a city building inspector who demands a small amount of money from the owner of an apartment building to ignore code violations, to a state court judge who extracts substantial interest-free loans from attorneys who have cases pending in his court. Violations of 18 U.S.C. 872 carry a three-year statutory maximum, while violations of 18 U.S.C. 1951 carry a statutory maximum of twenty years' imprisonment. The Hobbs Act treats extortion, conspiracies and attempts in the same manner. The reason these offenses are often not completed is that the victim complains to authorities or is acting in an undercover capacity. Lack of completion is not a measure of the defendant's culpability in attempting to use a public position for personal gain. The guidelines treat these offenses as equivalent to bribery.

§ 2C1.2 (18 U.S.C. 201 (f) and (g)). This section applies to a person who gives a gratuity to a public official for performing an official act, in violation of 18 U.S.C. 201(f) or to a public official who accepts or solicits a gratuity in violation of 18 U.S.C. 201(g). A corrupt purpose is not an element of these offenses, which carry a two-year maximum penalty. If the gratuity was given, or to be given, to an elected official or other official holding a high level decision-making or sensitive position, the offense level is increased. The term "official holding a high level decision-making or sensitive position" is defined in the Commentary to § 2C1.1. In some cases the public official is the instigator. In others, the private citizen who is attempting to ingratiate himself or his business with the public official may be the initiator. These factors may be considered by

the court in determining the sentence within the applicable guideline range.

§ 2C1.3 (18 U.S.C. 203, 205, 207-208). This section applies to present and former federal officers and employees who act in the face of financial and non-financial conflicts of interest proscribed by 18 U.S.C. 207 and 208. This section also applies to violations of 18 U.S.C. 203, which prohibits the offer or receipt of unlawful compensation by an appointed or elected official, or official-elect of the federal government, and is intended to ensure that government officials do not exert undue influence on government matters in response to the receipt of unlawful compensation. The above statutes provide a two-year maximum penalty.

§ 2C1.4 (18 U.S.C. 209, 1909). This section applies to violations of 18 U.S.C. 209 and 1909. 18 U.S.C. 209 provides a maximum term of imprisonment of one year for the receipt or payment of salary, or supplementation of salary of an officer or employee of the executive branch or an independent agency of the federal government, or an employee of the District of Columbia. 18 U.S.C. 1909 prohibits bank examiners from performing any service for compensation, for banks or bank officials.

§ 2C1.5 (18 U.S.C. 210-211). This section applies to offenses involving the offer or acceptance of payment in return for appointment to government office, in violation of 18 U.S.C. 210 and 211. Under 18 U.S.C. 210, it is illegal to pay, offer, or promise something of value to a person, firm, or corporation in consideration of procuring appointive office, while 18 U.S.C. 211 applies to the solicitation or acceptance of something of value in consideration of a promise of the use of influence in obtaining appointive federal office. Both statutes carry a maximum of one year of imprisonment.

§ 2C1.6 (18 U.S.C. 212-214, 217). This section applies to violations of 18 U.S.C. 212-214, and 217 involving the offer or acceptance of payments and gratuities by federal banking officials. These statutes carry a maximum of one year of imprisonment. Violations of 18 U.S.C. 212 and 213 involve the offer and acceptance of loans or gratuities to bank examiners. Violations of 18 U.S.C. 214 entail the offer or receipt of something of value for procuring a loan, or discount of commercial paper from a Federal Reserve bank. 18 U.S.C. 217 prohibits the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt.

Guidelines for offenses involving unlawful payments to bank officials in violation of 18 U.S.C. 215 appear in Part B (Offenses Involving Property).

## Part D—Offenses Involving Drugs

### 1. Unlawful Manufacturing, Importing, Exporting, Trafficking, or Possession; Continuing Criminal Enterprise

21 U.S.C. 841  
21 U.S.C. 843  
21 U.S.C. 845  
21 U.S.C. 845a, 845b  
21 U.S.C. 846  
21 U.S.C. 848

21 U.S.C. 856-857

21 U.S.C. 952-953

21 U.S.C. 955

21 U.S.C. 957

21 U.S.C. 959

21 U.S.C. 960-963

46 U.S.C. App. § 1903

**§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession With Intent To Commit These Offenses)**

**(a) Base Offense Level:**

(1) 43, for an offense that results in death or serious bodily injury with a prior conviction for a similar drug offense; or

(2) 38, for an offense that results in death or serious bodily injury and involved controlled substances (except Schedule III, IV, and V controlled substances and less than: (A) fifty kilograms of marihuana, (B) ten

kilograms of hashish, and (C) one kilogram of hashish oil); or

(3) For any other offense, the base offense level is the level specified in the Drug Quantity Table below.

**(b) Specific Offense Characteristic.**

(1) If a firearm or other dangerous weapon was possessed during commission of the offense, increase by 2 levels.

**DRUG QUANTITY TABLE**

Controlled substances and quantity*	Base offense level
10 KG Heroin or equivalent Schedule I or II Opiates, 50 KG Cocaine or equivalent Schedule I or II Stimulants, 500 G Cocaine Base, 10 KG PCP or 1 KG Pure PCP, 100 G LSD or equivalent Schedule I or II Hallucinogens, 4 KG Propanamide or 1 KG Propanamide Analogue (or more of any of the above), 10,000 KG + Marihuana.	Level 36.
3-9.9 KG Heroin or equivalent Schedule I or II Opiates, 15-49.9 KG Cocaine or equivalent Schedule I or II Stimulants, 150-499 G Cocaine Base, 3-9.9 KG PCP or 300-999 G Pure PCP, 30-99 G LSD or equivalent Schedule I or II Hallucinogens, 1.2-3.9 KG Propanamide or 300-999 G Propanamide Analogue, 3000-9999 KG Marihuana.	Level 34.
1-2.9 KG Heroin or equivalent Schedule I or II Opiates, 5-14.9 KG Cocaine or equivalent Schedule I or II Stimulants, 50-149 G Cocaine Base, 1-2.9 KG PCP or 100-299 G Pure PCP, 10-29 G LSD or equivalent Schedule I or II Hallucinogens, .4-1.1 KG Propanamide or 100-299 G Propanamide Analogue, 1000-2999 KG Marihuana.	Level 32.**
700-999 G Heroin or equivalent Schedule I or II Opiates, 3.5-4.9 KG Cocaine or equivalent Schedule I or II Stimulants, 35-49 G Cocaine Base, 700-999 G PCP or 70-99 G Pure PCP, 7-9.9 LSD or equivalent Schedule I or II Hallucinogens, 280-399 G Propanamide or 70-99 G Propanamide Analogue, 700-999 KG Marihuana.	Level 30.
400-699 G Heroin or equivalent Schedule I or II Opiates, 2-3.4 KG Cocaine or equivalent Schedule I or II Stimulants, 20-34.9 G Cocaine Base, 400-699 G PCP or 40-69 G Pure PCP, 4-6.9 G LSD or equivalent Schedule I or II Hallucinogens, 160-279 G Propanamide or 40-69 G Propanamide Analogue, 400-699 KG Marihuana.	Level 28.
100-399 G Heroin or equivalent Schedule I or II Opiates, 5-1.9 KG Cocaine or equivalent Schedule I or II Stimulants, 5-19 G Cocaine Base, 100-399 G PCP or 10-39 G Pure PCP, 1-3.9 G LSD or equivalent Schedule I or II Hallucinogens, 40-159 G Propanamide or 10-39 G Propanamide Analogue, 100-399 KG Marihuana.	Level 26.**
80-99 G Heroin or equivalent Schedule I or II Opiates, 400-499 G Cocaine or equivalent Schedule I or II Stimulants, 4-4.9 G Cocaine Base, 80-99 G PCP or 8-9.9 G Pure PCP, 800-999 MG LSD or equivalent Schedule I or II Hallucinogens, 32-39 G Propanamide or 8-9.9 G Propanamide Analogue, 80-99 KG Marihuana.	Level 24.
60-79 G Heroin or equivalent Schedule I or II Opiates, 300-399 G Cocaine or equivalent Schedule I or II Stimulants, 3-3.9 G Cocaine Base, 60-79 G PCP or 6-7.9 G Pure PCP, 600-799 MG LSD or equivalent Schedule I or II Hallucinogens, 24-31.9 G Propanamide or 6-7.9 G Propanamide Analogue, 60-79 KG Marihuana, 600 + Marihuana Plants, 12 KG + Hashish, 1.2 KG + Hashish Oil.	Level 22.
40-59 G Heroin or equivalent Schedule I or II Opiates, 200-299 G Cocaine or equivalent Schedule I or II Stimulants, 2-2.9 G Cocaine Base, 40-59 G PCP or 4-5.9 G Pure PCP, 400-599 MG LSD or equivalent Schedule I or II Hallucinogens, 16-23.9 G Propanamide or 4-5.9 G Propanamide Analogue, 40-59 KG Marihuana, 400-599 Marihuana Plants, 8-11.9 KG Hashish, .8-1.1 KG Hashish Oil, 20 KG + Schedule III or other Schedule I or II controlled substances.	Level 20.
20-39 G Heroin or equivalent Schedule I or II Opiates, 100-199 G Cocaine or equivalent Schedule I or II Stimulants, 1-1.9 G Cocaine Base, 20-39 G PCP or 2-3.9 G Pure PCP, 200-399 MG LSD or equivalent Schedule I or II Hallucinogens, 8-15.9 G Propanamide or 2-3.9 G Propanamide Analogue, 20-39 KG Marihuana, 200-399 Marihuana Plants, 5-7.9 KG Hashish, 500-799 G Hashish Oil, 10-19 KG Schedule III or other Schedule I or II controlled substances.	Level 18.
10-19 G Heroin or equivalent Schedule I or II Opiates, 50-99 G Cocaine or equivalent Schedule I or II Stimulants, 500-999 MG Cocaine Base, 10-19.9 G PCP or 1-1.9 G Pure PCP, 100-199 MG LSD or equivalent Schedule I or II Hallucinogens, 4-7.9 G Propanamide or 1-1.9 G Propanamide Analogue, 10-19 KG Marihuana, 100-199 Marihuana Plants, 2-4.9 KG Hashish, 200-499 G Hashish Oil, 5-9.9 KG Schedule III or other Schedule I or II controlled substances.	Level 16.
5-9.9 G Heroin or equivalent Schedule I or II Opiates, 25-49 G Cocaine or equivalent Schedule I or II Stimulants, 250-499 MG Cocaine Base, 5-9.9 G PCP or 500-999 MG Pure PCP, 50-99 MG LSD or equivalent Schedule I or II Hallucinogens, 2-3.9 G Propanamide or .5-9.9 G Propanamide Analogue, 5-9.9 KG Marihuana, 50-99 Marihuana Plants, 1-1.9 KG Hashish, 100-199 G Hashish Oil, 2.5-4.9 KG Schedule III or other Schedule I or II controlled substances.	Level 14.
Less than the following: 5 G Heroin or equivalent Schedule I or II Opiates, 25 G Cocaine or equivalent Schedule I or II Stimulants, 250 MG Cocaine Base, 5 G PCP or 500 MG Pure PCP, 50 MG LSD or equivalent Schedule I or II Hallucinogens, 2 G Propanamide or 500 MG Propanamide Analogue; 2.5-4.9 KG Marihuana, 25-49 Marihuana Plants, 500-999 G Hashish, 50-99 G Hashish Oil, 1.25-2.4 KG Schedule III or other Schedule I or II controlled substances, 20 KG + Schedule IV.	Level 12.
1-2.4 KG Marihuana, 10-24 Marihuana Plants, 200-499 G Hashish, 20-49 G Hashish Oil, 50-1.24 KG Schedule III or other Schedule I or II controlled substances, 8-19 KG Schedule IV.	Level 10.
250-999 G Marihuana, 3-9 Marihuana Plants, 50-199 G Hashish, 10-19 G Hashish Oil, 125-449 G Schedule III or other Schedule I or II controlled substances, 2-7.9 KG Schedule IV, 20 KG + Schedule V.	Level 8.
Less than the following: 250 G Marihuana, 3 Marihuana Plants, 50 G Hashish, 10 G Hashish Oil, 125 G Schedule III or other Schedule I or II controlled substances, 2 KG Schedule IV, 20 KG Schedule V.	Level 6.

\*The scale amounts for all controlled substances refer to the total weight of the controlled substance. Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or

compound shall be considered in measuring the quantity. If a mixture or compound contains a detectable amount of more than one controlled substance, the most serious controlled substance shall determine the categorization of the entire quantity.

\*\*Statute specifies a mandatory minimum sentence.

## COMMENTARY

§ 2D1.1 (21 U.S.C. 841, 960). Offenses under 21 U.S.C. 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense. Although the statutes require minimum penalties at certain weights for prior convictions, the enhanced penalty is reflected in the criminal history adjustment in Chapter Four. In determining criminal history, use of the phrase, "similar drug offense," in § 2D1.1(a)(1) refers to a prior conviction as described in 21 U.S.C. 841(b) or 960(b).

When there are multiple offenses, or multiple drug types, the quantities are to be added. Tables for making the necessary conversions are provided later in the Commentary.

The base offense levels in § 2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels 32 and 26 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Force, who also advocate the necessity of these distinctions.

The base offense levels with asterisks represent mandatory minimum sentences established by the Anti-Drug Abuse Act of 1986. These levels reflect sentences with a lower limit as close to the statutory requirement as possible; e.g., level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months. If it is uncertain whether the quantity of drugs involved falls into one category in the table or an adjacent category, the court may use the intermediate level for sentencing purposes. For example, sale of 700-999 grams of heroin is at level 30, while sale of 400-699 grams is at level 28. If the exact quantity is uncertain, but near 700 grams (or is an amount that would be between the two levels), use of level 29 would be permissible.

For each offense level in the Drug Quantity Table, a term of supervised release to follow imprisonment is required. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, §§ 5D3.1-5D3.3.

While the new legislation provides mandatory minimum sentences for many offenses, it also provides the means by which sentences lower than the statutory minimum may be imposed. 28 U.S.C. 994(n). A lower sentence may be imposed by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." See

§ 5K1.1 (Substantial Assistance to Authorities).

Trafficking in controlled substances, compounds, or mixtures of unusually high purity constitutes a basis to increase a sentence above the applicable guideline range. The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs.

Congress provides an exception to purity considerations in the case of phencyclidine (PCP). 21 U.S.C. 841(b)(1)(A). The legislation designates amounts of pure PCP and mixtures in establishing mandatory sentences. Row 1 of the table illustrates this distinction as one kilogram of PCP or 100 grams of pure PCP. Allowance for higher sentences based on purity is not appropriate for PCP.

Any reference to a particular controlled substance in these guidelines is also meant to include all salts, isomers, and all salts of isomers. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed.

Within generic categories, e.g., heroin, there are various levels of potency among the applicable controlled substances. While the Commission bases its general sentencing structure for drug offenses upon the degree of dangerousness as set forth by statute (21 U.S.C. 841(b)(1)), the following equivalency tables are provided for ease of application should multiple drugs be present.

In the event different categories of drugs are involved, conversions to both heroin and marijuana are provided. The equivalencies are first determined and then added. The result is then determined from the Drug Quantity Table.

When drug types result in penalties at the lower end of the Drug Quantity Table, an equivalency to heroin may not be appropriate, unless heroin, cocaine, cocaine base, PCP, or LSD are present. In those cases, the conversion should be to heroin and the base offense level may not be less than level 12. Otherwise, the conversion should be to marijuana.

## DRUG EQUIVALENCY TABLE

### *Schedule I Substances with Heroin Like Effects*

1 gm of Alpha-Methylfentanyl = 100 gm of heroin  
1 gm of Dextromoramide = 0.66 gm of heroin  
1 gm of Dipipanone = 0.25 gm of heroin  
1 gm of 3-Methylfentanyl = 125 gm of heroin  
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP = 5 gm of heroin

1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP = 5 gm of heroin

### *Schedule II Substances with Heroin Like Effects*

1 gm of Alphaprodine = 0.1 gm of heroin  
1 gm of Fentanyl = 31.25 gm of heroin  
1 gm of Hydromorphone/  
Dihydromorphinone = 2.5 gm of heroin  
1 gm of Levorphanol = 2.5 gm of heroin  
1 gm of Meperidine/Pethidine = 0.05 gm of heroin  
1 gm of Methadone = 0.5 gm of heroin  
1 gm of 6-Monoacetylmorphine = 1 gm of heroin  
1 gm of Morphine = 0.5 gm of heroin  
1 gm of Oxycodone = 1 gm of heroin  
1 gm of Oxymorphone = 5 gm of heroin  
1 gm of Racemorphan = 1.66 gm of heroin

### *Cocaine and Other Schedule I and II Stimulants*

1 gm of Cocaine = 0.2 gm of heroin  
1 gm of N-Ethylamphetamine = 0.08 gm of heroin  
1 gm of Fenethyline = 0.04 gm of heroin  
1 gm of Amphetamine = 0.2 gm of heroin  
1 gm of Dextroamphetamine = 0.2 gm of heroin  
1 gm of Methamphetamine = 0.4 gm of heroin  
1 gm of L-Methamphetamine/Levo-methamphetamine/  
L-Desoxyephedrine = 0.04 gm of heroin  
1 gm of Phenmetrazine = 0.08 gm of heroin  
1 gm of Phenylacetone/P<sub>2</sub>P (amphetamine precursor) = 0.075 gm of heroin  
1 gm of Phenylacetone/P<sub>2</sub>P (methamphetamine precursor) = 0.166 gm of heroin

### *LSD, PCP, and Other Schedule I and II Hallucinogens*

1 gm of Bufotenine = 0.07 gm of heroin  
1 gm of D-Lysergic Acid Diethylamide/  
Lysergide/LSD = 100 gm of heroin  
1 gm of Diethyltryptamine/DET = 0.08 gm of heroin  
1 gm of Dimethyltryptamine/DMT = 0.1 gm of heroin  
1 gm of Mescaline = 0.01 gm of heroin  
1 gm of Mushrooms containing Psilocin and/  
or Psilocybin (Dry) = 0.001 gm of heroin  
1 gm of Mushrooms containing Psilocin and/  
or Psilocybin (Wet) = 0.0001 gm of heroin  
1 gm of Peyote (Dry) = 0.0005 gm of heroin  
1 gm of Peyote (Wet) = 0.00005 gm of heroin  
1 gm of Phencyclidine/PCP = 1 gm of heroin  
1 gm of Phencyclidine (Pure PCP) = 10 gm of heroin  
1 gm of Liquid Phencyclidine = 0.1 gm of heroin  
1 gm of Psilocin = 0.5 gm of heroin  
1 gm of Psilocybin = 0.5 gm of heroin  
1 gm of Pyrrolidine Analog of Phencyclidine/  
PHP = 1 gm of heroin  
1 gm of Thiophene Analog of Phencyclidine/  
TCP = 1 gm of heroin  
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/  
DOB = 2.5 gm of heroin

1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM=1.66 gm of heroin  
 1 gm of 3,4-Methylenedioxyamphetamine/MDA=0.05 gm of heroin  
 1 gm of 3,4-Methylenedioxymethamphetamine/MDMA=0.035 gm of heroin  
 1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC=0.68 gm of heroin

#### Schedule I Marihuana

1 gm of Marihuana/Cannabis=1 mg of heroin  
 1 Marihuana/Cannabis Plant=0.1 gm of heroin/100 gm of marihuana  
 1 gm of Marihuana/Cannabis, granulated, powdered, etc.=1 mg of heroin/1 gm of marihuana  
 1 gm of Hash/Hashish Oil=0.05 gm of heroin/50 gm of marihuana  
 1 gm of Cannabis Resin or Hashish=5 mg of heroin/5 gm of marihuana  
 1 gm of Tetrahydrocannabinol, Organic=0.167 gm of heroin/167 gm of marihuana  
 1 gm of Tetrahydrocannabinol, Synthetic=0.167 gm of heroin/167 gm of marihuana

#### Schedule I or II Depressants and Schedule II Narcotics

1 gm of Codeine=0.08 gm of heroin/80 gm of marihuana  
 1 gm of Dextropropoxyphene/Propoxyphene-Bulk=0.05 gm of heroin/50 gm of marihuana  
 1 gm of Ethylmorphine=0.165 gm of heroin/165 gm of marihuana  
 1 gm of Hydrocodone/Dihydrocodeinone=1 gm of heroin/1 kg of marihuana  
 1 gm of Mixed Alkaloids of Opium/Papaveretum=0.25 gm of heroin/250 gm of marihuana  
 1 gm of Opium=0.05 gm of heroin/50 gm of marihuana  
 1 gm of Opium Extract=0.1 gm of heroin/100 gm of marihuana  
 1 gm of Opium Fluid Extract=0.004 gm of heroin/4 gm of marihuana  
 1 gm of Opium Granulated=0.05 gm of heroin/50 gm of marihuana  
 1 gm of Opium Plant Form=0.05 gm of heroin/50 gm of marihuana  
 1 gm of Opium Powdered=0.05 gm of heroin/50 gm of marihuana  
 1 gm of Opium Tincture=0.005 gm of heroin/5 gm of marihuana  
 1 gm of Methaqualone=0.7 mg of heroin/700 mg of marihuana  
 1 gm of Amobarbital=2 mg of heroin/2 gm of marihuana  
 1 gm of Pentobarbital=2 mg of heroin/2 gm of marihuana  
 1 gm of Secobarbital=2 mg of heroin/2 gm of marihuana

#### Schedule III Substances

1 gm of Allobarbitol=2 mg of heroin/2 gm of marihuana  
 1 gm of Aprobarbital=2 mg of heroin/2 gm of marihuana  
 1 gm of Barbiturate=2 mg of heroin/2 gm of marihuana  
 1 gm of Butobarbital=2 mg of heroin/2 gm of marihuana

1 gm of Butalbital=2 mg of heroin/2 gm of marihuana  
 1 gm of Butobarbital/butethal=2 mg of heroin/2 gm of marihuana  
 1 gm of Cyclobarbitol=2 mg of heroin/2 gm of marihuana  
 1 gm of Cyclopentobarbital=2 mg of heroin/2 gm of marihuana  
 1 gm of Gulethimide=0.4 mg of heroin/400 gm of marihuana  
 1 gm of Heptabarbitol=2 mg of heroin/2 gm of marihuana  
 1 gm of Hexethal=2 mg of heroin/2 gm of marihuana  
 1 gm of Hexobarbital=2 mg of heroin/2 gm of marihuana  
 1 gm of Metharbitol=2 mg of heroin/2 gm of marihuana  
 1 gm of Talbutal=2 mg of heroin/2 gm of marihuana  
 1 gm of Thialbarbital=2 mg of heroin/2 gm of marihuana  
 1 gm of Thiomytal=2 mg of heroin/2 gm of marihuana  
 1 gm of Thiobarbital=2 mg of heroin/2 gm of marihuana  
 1 gm of Thiohexethal=2 mg of heroin/2 gm of marihuana  
 1 gm of Thiopental=2 mg of heroin/2 gm of marihuana  
 1 gm of Vinbarbital=2 mg of heroin/2 gm of marihuana  
 1 gm of Vinylbital=2 mg of heroin/2 gm of marihuana  
 1 gm of Phendimetrazine=2 mg of heroin/2 gm of marihuana  
 1 gm of Paregoric=0.01 mg of heroin/10 mg of marihuana  
 1 gm of Hydrocodone Cough Syrups=0.01 mg of heroin/10 mg of marihuana

#### Schedule IV and V Substances

1 gm of Phentermine=0.02 mg of heroin/20 mg of marihuana  
 1 gm of Pentazocine=0.01 mg of heroin/10 mg of marihuana  
 1 gm of Codeine Cough Syrups=0.00002 mg of heroin/0.02 mg of marihuana  
 1 gm of Barbitol=0.006 mg of heroin/6 mg of marihuana  
 1 gm of Diazepam=0.063 mg of heroin/63 mg of marihuana  
 1 gm of Phenobarbital=0.006 mg of heroin/6 mg of marihuana  
 1 gm of Mephobarbital=0.006 mg of heroin/6 mg of marihuana  
 1 gm of Methohexital=0.006 mg of heroin/6 mg of marihuana  
 1 gm of Methylphenobarbital/Mephobarbital=0.006 mg of heroin/6 mg of marihuana  
 1 gm of Nitrazepam=0.063 mg of heroin/63 mg of marihuana

To facilitate conversions to drug equivalencies, the following table is provided:

#### DRUG CONVERSION TABLE

1oz=28.35 gm  
 1lb=453.6 gm  
 1lb=.45 kg  
 1kg=2.2 lbs  
 1gal=3.8 liters  
 1qt=.95 liters  
 1gm=1 ml (liquid)  
 1liter=1,000 ml

1kg=1,000 gm  
 1gm=1,000 mg  
 1grain=64.8 mg

Sentences under the Anti-Drug Abuse Act are guided by standardized amounts of drugs involved in the offense. The following dosage equivalents for certain common drugs are provided by the Drug Enforcement Administration to facilitate the application of § 2D1.1 of the guidelines.

#### DOSAGE EQUIVALENCY TABLE

##### Hallucinogens

Anhalamine.....	300 mg
Anhalonide.....	300 mg
Anhalonine.....	300 mg
Bufotenine.....	1 mg
Diethyltryptamine.....	60 mg
Dimethyltryptamine.....	50 mg
Lophophorine.....	300 mg
LSD (Lysergic acid diethylamide).....	0.1 mg
LSD tartrate.....	0.05 mg
MDA.....	100 mg
Mescaline.....	500 mg
PCP.....	5 mg
Pellotine.....	300 mg
Peyote.....	12 mg
Psilocin.....	10 mg
Psilocybin.....	10 mg
STP (DOM) Dimethoxyamphetamine.....	3 mg

##### Depressants

Barbiturates.....	100 mg
Brallorbarbital.....	30 mg
Eldoral.....	100 mg
Eunaron.....	100 mg
Hexethal.....	100 mg
Methaqualone.....	300 mg
Thiobarbital.....	50 mg
Thiohexethal.....	60 mg

##### Stimulants

Amphetamines.....	10 mg
Ethylamphetamine HCL.....	12 mg
Ethylamphetamine SO4.....	12 mg
Methamphetamine combinations.....	5 mg
Methamphetamines.....	5 mg
Preludin.....	25 mg

The dosage equivalents provided in these tables reflect the amount of the pure drug contained in an average dose.

A defendant who used special skills in the commission of the offense may be subject to an enhancement for role in the offense. See § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense.

The statutory maximum penalty for trafficking in less than fifty kilograms of marihuana, ten kilograms of hashish, one kilogram of hashish oil, or any amount of Schedule III, IV, or V controlled substances is five years' imprisonment. With a prior conviction for similar drug related offenses the statutory maximum penalty is ten years. It should be noted that although the Drug Quantity Table applies to trafficking in small amounts of marihuana, under 21 U.S.C.

§ 841(b)(4), distribution of "a small amount of marihuana for no remuneration" is treated as simple possession, to which § 2D2.1 applies.

The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that reference § 2D1.1, i.e., §§ 2D1.2-2D1.4. The adjustment is to be applied even if several counts are involved and the weapon was present in any of them.

#### § 2D1.2. Involving Juveniles in the Trafficking of Controlled Substances

(a) Base Offense Level:

(1) Level from § 2D1.1, corresponding to triple the drug amount involved, but in no event less than level 13, for involving an individual less than fourteen years of age; or

(2) Level from § 2D1.1, corresponding to double the drug amount involved, for involving an individual at least fourteen years of age and less than eighteen years of age.

#### § 2D1.3. Distributing Controlled Substances to Individuals Younger Than Twenty-One Years, To Pregnant Women, or Within 1,000 Feet of a School or College

(a) Base Offense Level:

(1) Level from § 2D1.1, corresponding to double the drug amount involved, but in no event less than level 13, for distributing a controlled substance to a pregnant woman;

(2)(A) Level from § 2D1.1, corresponding to double the drug amount involved, but in no event less than level 13, for distributing a controlled substance other than five grams or less of marihuana to an individual under the age of twenty-one years; or

(B) Level from § 2D1.1, corresponding to double the drug amount involved, but in no event less than level 13, for distributing or manufacturing a controlled substance other than five grams or less of marihuana within 1,000 feet of a schoolyard.

#### § 2D1.4. Attempts and Conspiracies

(a) Base Offense Level: If a defendant is convicted of participating in an incomplete conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed.

#### § 2D1.5. Continuing Criminal Enterprise

(a) Base Offense Level:

(1) 32, for the first conviction of engaging in a continuing criminal enterprise; or

(2) 38, for the second or any subsequent conviction of engaging in a continuing criminal enterprise; or

(3) 43, for engaging in a continuing criminal enterprise as the principal administrator, leader, or organizer, if either the amount of drugs involved was 300 times that specified in Row 1 of the Drug Quantity Table or the principal received \$10 million in gross receipts for any twelve-month period.

#### § 2D1.6. Use of Communication Facility in Committing Drug Offense

(a) Base Offense Level: 12.

#### § 2D1.7. Unlawful Interstate Sale and Transporting of Drug Paraphernalia

(a) Base Offense Level: 12.

#### § 2D1.8. Renting or Managing a Drug Establishment

(a) Base Offense Level: 16.

(b) Specific Offense Characteristic:

(1) If a firearm or other dangerous weapon was possessed during commission of the offense, increase by 2 levels.

#### § 2D1.9. Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances

(a) Base Offense Level: 23.

#### COMMENTARY

§ 2D1.2 (21 U.S.C. 845b). The statute addressed by this section punishes any person eighteen years of age or older who knowingly employs or uses any person younger than eighteen to violate or to conceal any violation of any provision of Title 21. Section 845b provides a minimum mandatory period of imprisonment of one year (provided for by the minimum base offense level of 13) in addition to the punishment imposed for the applicable crime in which the defendant involved a juvenile. An increased penalty for the employment or use of persons under age fourteen is statutorily directed by 21 U.S.C. 845b(d).

If multiple drugs or offenses occur and the entire amount does not involve juveniles, double or triple the drug amounts for those offenses involving juveniles before totalling the amounts. For example, if there are three drug offenses of conviction and only one involves juveniles in trafficking, add the amount from the first and second offense, double the amount for the offense involving juveniles, and total. Use that total to determine the base offense level.

The reference to the level from § 2D1.1 includes the base offense level plus the specific offense characteristic dealing with a weapon. Under § 2D1.1(b)(1) there is a two level increase for possession of a firearm or

other dangerous weapon during commission of the offense.

§ 2D1.3 (21 U.S.C. 845, 845a). The provisions addressed by this section contain a mandatory minimum period of imprisonment of one year. The base offense level is determined as in § 2D1.2. If more than one enhancement provision is applicable in a particular case, the punishment imposed under the separate enhancement provisions should be added together in calculating the appropriate guideline sentence. However, only one of the enhancements in § 2D1.3(a)(2) shall apply in a given case.

The guideline sentences for distribution of controlled substances to individuals under twenty-one years of age or within 1000 feet of a school or college treat the distribution of less than five grams of marihuana less harshly than other controlled substances. This distinction is based on the statutory provisions that specifically exempt convictions for the distribution of less than five grams of marihuana from the mandatory minimum one-year imprisonment requirement.

If multiple drugs or offenses occur, determine the offense level as described in the Commentary to § 2D1.2.

The reference to the level from § 2D1.1 includes the base offense level plus the specific offense characteristic dealing with a weapon. Under § 2D1.1(b)(1) there is a 2 level increase for possession of a firearm, or other dangerous weapon during the commission of the offense.

§ 2D1.4 (21 U.S.C. 846, 963). Although attempts and conspiracies are not subject to the mandatory minimums under the Anti-Drug Abuse Act, the Commission has elected to treat them the same as the underlying offense. If the defendant is convicted of a conspiracy that includes transactions in controlled substances in addition to those that are the subject of substantive counts of conviction, each conspiracy transaction shall be included with those of the substantive counts of conviction to determine scale. If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. Where the defendant was not reasonably capable of producing the negotiated amount the court may depart and impose a sentence lower than the sentence that would otherwise result. If the defendant is convicted of conspiracy, the sentence should be imposed only on the basis of the defendant's conduct or the conduct of co-conspirators that was reasonably foreseeable and in furtherance of the conspiracy.

Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. In making this determination, the judge may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

See Commentary to § 2D1.1 regarding weapon possession.

§ 2D1.5 (21 U.S.C. 848). The base offense levels for continuing criminal enterprise are mandatory minimum sentences provided by the statute that mandate imprisonment for leaders of large scale drug enterprises. When sentencing for convictions under 21 U.S.C. 848, § 2D1.5 reflects the defendant's role in the enterprise. A conviction establishes that the defendant controlled and exercised decision-making authority over one of the most serious forms of ongoing criminal activity. Therefore, an adjustment for role in the offense in Chapter Three, Part B, is not applicable to convictions under 21 U.S.C. 848.

§ 2D1.6 (21 U.S.C. 843(b)). A communication facility includes any public or private instrument used in the transmission of writing, signs, signals, pictures, and sound; e.g., telephone, wire, radio. The statutory maximum penalty is four years' imprisonment except where a prior conviction provides for a maximum sentence of eight years.

§ 2D1.7 (21 U.S.C. 857). Subtitle O of the Anti-Drug Abuse Act creates the new offense of interstate sale or transportation of drug paraphernalia. The statutory maximum penalty is three years' imprisonment.

§ 2D1.8 (21 U.S.C. 856). Subtitle P of the Anti-Drug Abuse Act adds a new category to the drug-related offenses set out at 21 U.S.C. 856. This provision makes it unlawful to knowingly open or maintain, manage, or control any building, room, or enclosure for the purpose of manufacturing, distributing, storing, or using a controlled substance contrary to law (e.g., "crackhouses"). A maximum period of twenty years' imprisonment may be imposed for violation of this statute.

Under § 2D1.8(b)(1) there is a 2-level increase for possession of a firearm or other dangerous weapon during commission of the offense.

§ 2D1.9 (21 U.S.C. 841(e)(1)). This provision refers to offenses under 21 U.S.C. 841(e)(1), making it unlawful to assemble, place or cause to be placed, or to maintain a "boobytrap" on federal property where a controlled substance is being manufactured or distributed. A maximum period of ten years' imprisonment may be imposed under this statute, except where a prior conviction provides for a maximum sentence of twenty years.

## 2. Unlawful Possession

18 U.S.C. 342

21 U.S.C. 843(a)(3)

21 U.S.C. 844

### § 2D2.1. Unlawful Possession

(a) Base Offense Level:

(1) 8, if the substance is heroin or any Schedule I-II opiate, or LSD, or an analogue of these; or

(2) 6, if the substance is cocaine or PCP; or

(3) 4, if the substance is any other controlled substance.

### § 2D2.2. Acquiring a Controlled Substance by Forgery, Fraud, Deception, or Subterfuge

(a) Base Offense Level: 8.

### § 2D2.3. Operating or Directing the Operation of a Common Carrier Under the Influence of Alcohol or Drugs

(a) Base Offense Level: 8.

## COMMENTARY

§ 2D2.1 (21 U.S.C. 844(a)). The statutory maximum penalty for simple possession is one year imprisonment. With a single prior drug related conviction, a minimum fifteen days and maximum two years' imprisonment is authorized. For two or more convictions, a minimum ninety days and maximum three years' imprisonment is authorized.

§ 2D2.2 (21 U.S.C. 843(a)(3)). The maximum penalty for this offense is four years' imprisonment. With a prior drug related felony offense, a maximum eight-year prison term is permitted.

§ 2D2.3 (18 U.S.C. 342). The statutory maximum for this offense is five years' imprisonment.

\* \* \* \* \*

## 3. Regulatory Violations

21 U.S.C. 842

21 U.S.C. 843(a)

21 U.S.C. 954

21 U.S.C. 961(2)

### § 2D3.1. Illegal Use of Registration Number to Manufacture, Distribute, Acquire, or Dispense a Controlled Substance

(a) Base Offense Level: 6.

### § 2D3.2. Manufacture of Controlled Substance in Excess of or Unauthorized by Registration Quota

(a) Base Offense Level: 4.

### § 2D3.3. Illegal Use of Registration Number to Distribute or Dispense a Controlled Substance to Another Registrant or Authorized Person

(a) Base Offense Level: 4.

### § 2D3.4. Illegal Transfer or Transshipment of a Controlled Substance

(a) Base Offense Level: 4.

## COMMENTARY

§ 2D3.1 (21 U.S.C. 843(a)). The statutory maximum penalty is four years' imprisonment. With a prior drug related felony offense, a maximum eight years' imprisonment is authorized.

§§ 2D3.2 and 2D3.3 (21 U.S.C. 842). The statutory maximum for these offenses is one year imprisonment.

§ 2D3.4 (21 U.S.C. 954). The statutory maximum penalty for this offense is one year imprisonment.

## Part E—Offenses Involving Criminal Enterprises and Racketeering

### 1. Racketeering

18 U.S.C. 1951–1952

18 U.S.C. 1952A–1952B

18 U.S.C. 1962–1963

### § 2E1.1. Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations

(a) Base Offense Level (Apply the greater):

(1) 19; or

(2) The offense level applicable to the underlying racketeering activity.

### § 2E1.2. Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise

(a) Base Offense Level (Apply the greater):

(1) 6; or

(2) The offense level applicable to the underlying crime of violence or other unlawful activity in respect to which the travel or transportation was undertaken.

### § 2E1.3. Violent Crimes in Aid of Racketeering Activity

(a) Base Offense Level (Apply the greater):

(1) 12; or

(2) The offense level applicable to the underlying crime or racketeering activity.

### § 2E1.4. Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire

(a) Base Offense Level (Apply the greater):

(1) 23; or

(2) The offense level applicable to the underlying unlawful conduct.

### § 2E1.5. Hobbs Act Extortion or Robbery

Apply the guideline provision for extortion or robbery, as applicable.

## COMMENTARY

When sentencing for racketeering offenses, it is especially important that the sentence reflect the defendant's role in the racketeering scheme. Attention is specifically directed to Chapter Three, Part B (Role in the Offense) for the appropriate adjustment to the offense level.

Because of the jurisdictional nature of the offenses included in this section, a variety of criminal offenses fall under these provisions. As the primary concern rests with the underlying conduct, the offense level usually will be determined by the offense level of the underlying conduct. However, because of the seriousness of these offenses, alternative minimum offense levels are provided in order to ensure adequate sentences.

§ 2E1.1 (18 U.S.C. 1962–1963). This section applies to conduct proscribed by the Racketeer Influenced and Corrupt

Organizations Act (RICO). To determine the base offense level, the offense level for each underlying offense should first be determined. The underlying offense with the highest offense level will be considered the primary RICO offense. The primary RICO offense is then adjusted according to the guidelines for multiple counts, treating each underlying offense as a separate count.

If the underlying racketeering activity involves violations of state law, the offense level should be computed by using the offense level applicable to the corresponding or most analogous federal statute. If a base offense level cannot be determined in this manner or is less than 19, the alternative level of 19 will apply.

§ 2E1.2 (18 U.S.C. 1952). This jurisdictional statute is directed to a variety of unlawful conduct. The base level is 6, or the offense level for the underlying crime of violence or other unlawful activity, whichever is greater.

§ 2E1.3 (18 U.S.C. 1952B). The base offense level is 12, or the offense level for the underlying conduct, whichever is greater. The proscribed activities range from threats to murder, with the statutory maximum sentences ranging from three years to life imprisonment.

§ 2E1.4 (18 U.S.C. 1952A). This statute is jurisdictional, reaching the underlying conduct of murder or intended murder committed for pecuniary gain, with the requisite nexus provided by interstate or foreign travel, or the use of facilities in interstate commerce. The maximum authorized imprisonment sentence under this statute is five years if no personal injury resulted, twenty years if personal injury resulted, and life imprisonment if death resulted.

§ 2E1.5 (18 U.S.C. 1951). This section covers two different aspects of the Hobbs Act, which proscribes interference with interstate commerce by robbery or extortion. The guidelines at § 2B3.1 (Robbery) or § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) normally will apply. In some cases, § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or § 2B3.3 (Blackmail and Similar Forms of Extortion) may apply. See Commentary to § 2B3.2.

## 2. Extortionate Extension of Credit

18 U.S.C. 892-894

### § 2E2.1. Making, Financing, or Collecting an Extortionate Extension of Credit

(a) Base Offense Level: 20.

(b) Specific Offense Characteristics.

(1)(A) If a firearm was discharged increase by 5 levels; or

(B) If a firearm or a dangerous weapon was otherwise used, increase by 4 levels; or

(C) If a firearm or other dangerous weapon was possessed, increase by 3 levels.

(2) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

## Degree of bodily injury

Increase in level

- (A) Bodily injury ..... Add 2.  
(B) Serious bodily injury ..... Add 4.

(C) Permanent or Life-Threatening add 6 Bodily Injury.

Provided, however, that the combined increase from (1) and (2) shall not exceed 9 levels.

(3)(A) If any person was abducted to facilitate the commission of the offense or an escape from the scene of the crime, increase by 4 levels;

(B) If any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.

## COMMENTARY

§ 2E2.1 (18 U.S.C. 892-894). This section refers to offenses involving the making or financing of extortionate extensions of credit, or the collection of loans by extortionate means. These "loan-sharking" offenses typically involve threats of violence and provide economic support for organized crime. The base offense level for these offenses is higher than the offense level for extortion because loan sharking is in most cases a continuing activity. In addition, the guideline does not include the amount of money involved because the amount of money in such cases is often difficult to compute. Other enhancements parallel those in § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

## 3. Gambling

15 U.S.C. 1172-1176

18 U.S.C. 1082

18 U.S.C. 1084

18 U.S.C. 1301-1304

18 U.S.C. 1306

18 U.S.C. 1511

18 U.S.C. 1953

18 U.S.C. 1955

### § 2E3.1. Engaging in a Gambling Business

(a) Base Offense Level: 12.

### § 2E3.2. Transmission of Wagering Information

(a) Base Offense Level: 12.

### § 2E3.3. Other Gambling Offenses

(a) Base Offense Level: 6.

(b) Specific Offense Characteristics.

(1) If the offense is committed as part of, or to facilitate, a commercial gambling operation, increase by 6 levels.

## COMMENTARY

§ 2E3.1 (18 U.S.C. 1955). See Chapter Three, Part B (Role in the Offense) for adjustments to the offense level based on the scope of the defendant's participation.

§ 2E3.2 (18 U.S.C. 1084). See Chapter Three, Part B (Role in the Offense) for adjustments

to the offense level based on the scope of the defendant's participation.

§ 2E3.3 (15 U.S.C. 1172-1175, 18 U.S.C. 1082, 1301-1304, 1306, 1511, 1953). This section includes conduct proscribed by various statutes. A specific offense characteristic has been included to distinguish commercial from non-commercial gambling offenses. See Chapter Three, Part B (Role in the Offense) for adjustments to the offense level based on the scope of the defendant's participation.

## 4. Trafficking in Contraband Cigarettes

18 U.S.C. 2342(a)

18 U.S.C. 2344(a)

### § 2E4.1. Unlawful Conduct Relating to Contraband Cigarettes

(a) Base Offense Level (Apply the greater):

(1) 9; or

(2) The offense level from the table in § 2T4.1 (Tax Table) corresponding to the amount of the tax evaded.

## COMMENTARY

§ 2E4.1 (18 U.S.C. 2342(a)). The offense covered by this section generally involves evasion of state excise taxes and becomes a federal matter only upon the establishment of minimum quantities transported in interstate commerce or by use of interstate communications. Because this offense is basically a tax matter, the tax table under § 2T4.1 (Tax Table) is used to determine the appropriate offense level.<sup>8</sup>

## 5. Labor Racketeering

18 U.S.C. 664

18 U.S.C. 1027

18 U.S.C. 1231

18 U.S.C. 1954

29 U.S.C. 162

29 U.S.C. 186

29 U.S.C. 431-439

29 U.S.C. 461

29 U.S.C. 501(c)

29 U.S.C. 504

29 U.S.C. 530

29 U.S.C. 1111

29 U.S.C. 1141

### § 2E5.1. Bribery or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan

(a) Base Offense Level:

(1) 10, if a bribe; or

(2) 6, if a gratuity.

(b) Specific Offense Characteristics.

(1) If the defendant was a fiduciary of the benefit plan, increase by 2 levels.

(2) Increase by the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.

**§ 2E5.2. Theft or Embezzlement from Employee Pension and Welfare Benefit Plans**

- (a) Base Offense Level: 4.  
 (b) Specific Offense Characteristics.  
 (1) If the offense involved more than minimal planning, increase by 2 levels.  
 (2) If the defendant had a fiduciary obligation under the Employee Retirement Income Security Act, increase by 2 levels.  
 (3) Increase by corresponding number of levels from the table in § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) according to the value of the property stolen.

**§ 2E5.3. False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act**

- (a) Base Offense Level (Apply the greater):  
 (1) 6; or  
 (2) If false records were used for criminal conversion of plan funds or a scheme involving a bribe or a gratuity relating to the operation of an employee benefit plan, apply § 2E5.2 or § 2E5.1, as applicable.

**§ 2E5.4. Embezzlement or Theft from Labor Unions in the Private Sector**

- (a) Base Offense Level: 4.  
 (b) Specific Offense Characteristics.  
 (1) If the offense involved more than minimal planning, increase by 2 levels.  
 (2) If the defendant was a union officer or occupied a position of trust in the union, as set forth in 29 U.S.C. § 501(a), increase by 2 levels.  
 (3) Increase by the number of levels from the table in § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) corresponding to the value of the property stolen.

**§ 2E5.5. Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act**

- (a) Base Offense Level (Apply the greater):  
 (1) 6; or  
 (2) If false records were used for criminal conversion of funds or a scheme involving a bribe or gratuity, apply § 2E5.4 or § 2E5.6, as applicable.

**§ 2E5.6. Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations**

- (a) Base Offense Level:  
 (1) 10, if a bribe; or  
 (2) 6, if a gratuity.  
 (b) Specific Offense Characteristic.  
 (1) Increase by the number of levels from the table in § 2F1.1 (Fraud and

Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.

**COMMENTARY**

The base offense levels for many of these provisions have been determined by reference to analogous sections of the guidelines. Thus, the base offense levels for bribery, theft, and fraud in this subpart generally correspond to similar conduct under other parts of the guidelines. The base offense levels for bribery and graft have been set higher than commercial bribery due to the particular vulnerability of the organizations covered by this subpart to exploitation.

The statutes included in this subpart protect the rights of employees under the Taft-Hartley Act, of members of labor organizations under the Labor-Management Reporting and Disclosure Act of 1959, and participants of employee pension and welfare benefit plans covered under the Employee Retirement Income Security Act.

§ 2E5.1 (18 U.S.C. § 1954). This section covers the giving or receipt of bribes and other illegal gratuities involving employee welfare or pension benefit plans. This offense may involve persons who have a fiduciary duty to the benefit plan. If the enhancement for a fiduciary duty is applied, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). The seriousness of the offense is determined by several factors, including the value of the gratuity and the magnitude of the loss resulting from the transaction. A more severe penalty is warranted in a bribery where the payment is the primary motivation for an action to be taken, as opposed to graft, where the prohibited payment is given because of a person's actions, duties, or decisions without a prior understanding that the recipient's performance will be directly influenced by the gift.

§ 2E5.2 (18 U.S.C. § 664). This section covers theft or conversion from employee benefit plans by fiduciaries, or by any person, including borrowers to whom loans are disbursed based upon materially defective loan applications, service providers who are paid on inflated billings, and beneficiaries paid as the result of fraudulent claims. The base offense level corresponds to the base offense level for other forms of theft. Specific offense characteristics address whether a defendant has a fiduciary relationship to the benefit plan, the sophistication of the offense, and the scale of the offense. If the enhancement for a fiduciary relationship is applied, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skills).

§ 2E5.3 (18 U.S.C. § 1027). This section covers the falsification of documents or records relating to a benefit plan covered by ERISA. Such violations sometimes occur in connection with the criminal conversion of plan funds or schemes involving bribery or graft. Where a violation of this section occurs in connection with another offense, the defendant should be sentenced according to the guideline for the offense that was facilitated by the false statements or documents.

§ 2E5.4 (29 U.S.C. 501(c)). This section includes embezzlement or theft from a labor

organization. It is directed at union officers and persons employed by a union. The seriousness of this offense is determined by the amount of money taken, the sophistication of the offense, and the nature of the defendant's position in the union. If the enhancement for the nature of the defendant's position in the union is applied, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

§ 2E5.5 (29 U.S.C. §§ 439 and 461). This section covers failure to maintain proper documents required by the LMRDA or falsification of such documents. This offense is a misdemeanor.

§ 2E5.6 (29 U.S.C. § 186). This section covers bribery and other prohibited transactions by employers, labor relations consultants, and their agents, with respect to labor officials in industries governed by the Taft-Hartley Act. The statute contains misdemeanor and felony provisions, depending upon whether the prohibited payment exceeds \$100. Where the prohibited payment is made with an intent to influence the actions, duties, or decisions of the employee representative or union official, or is received with knowledge of such an intent, a more severe penalty is warranted.

**Part F—Offenses Involving Fraud or Deceit**

- 7 U.S.C. 6, 6b, 6c, 6h, 6o  
 7 U.S.C. 13  
 7 U.S.C. 23  
 15 U.S.C. 77a–80b–17.  
 15 U.S.C. 1644  
 18 U.S.C. 285–291  
 18 U.S.C. 371  
 18 U.S.C. 656  
 18 U.S.C. 659  
 18 U.S.C. 1001–1030  
 18 U.S.C. 1341–1344

**§ 2F1.1. Fraud and Deceit**

- (a) Base Offense Level: 6.  
 (b) Specific Offense Characteristics.  
 (1) If the estimated, probable or intended loss exceeded \$2,000, increase the offense level as follows:

Loss	Increase in level
(A) \$2,000 or less .....	No increase.
(B) \$2,001 to \$5,000 .....	Add 1.
(C) \$5,001 to \$10,000 .....	Add 2.
(D) \$10,001 to \$20,000 .....	Add 3.
(E) \$20,001 to \$50,000 .....	Add 4.
(F) \$50,001 to \$100,000 .....	Add 5.
(G) \$100,001 to \$200,000 .....	Add 6.
(H) \$200,001 to \$500,000 .....	Add 7.
(I) \$500,001 to \$1,000,000 .....	Add 8.
(J) \$1,000,001 to \$2,000,000 .....	Add 9.
(K) \$2,000,001 to \$5,000,000 .....	Add 10.
(L) Over \$5,000,000 .....	Add 11.

(2) If the offense involved (A) more than minimal planning; (B) a scheme to defraud more than one victim; (C) a misrepresentation that the defendant was acting on behalf of a charitable,

educational, religious or political organization, or a government agency; or (D) violation of any judicial or administrative order, injunction, decree or process; increase by 2 levels, but if the result is less than level 10, increase to level 10.

(3) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.

#### § 2F1.2. Insider Trading

(a) Base Offense Level: 8.

(b) Specific Offense Characteristic.

(1) Increase by the number of levels from the table in § 2F1.1 corresponding to the gain resulting from the defendant's conduct.

#### COMMENTARY

§ 2F1.1. This guideline is designed to apply to a wide variety of fraud cases. The statutory maximum term of imprisonment for most such offenses is five years.

The guideline does not link offense characteristics to specific code sections. Because federal fraud statutes are so broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction is somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity.

Empirical analyses of current practices show that the most important factors that determine sentence length are the amount of loss and whether the offense is an isolated crime of opportunity or is sophisticated or compound. Those are the primary factors upon which the guideline has been based.

The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud is indicative of an intention and potential to do considerable harm. In current practice, this factor has a significant impact, especially in frauds involving small losses. Accordingly, the guideline not only specifies a 2-3 level enhancement when this factor is present, but also specifies that the minimum offense level in such cases shall be 10. A number of special cases are specifically broken out under subdivision (b)(2) to ensure that defendants in such cases are adequately punished.

False pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims' charitable impulses or trust in government create particular social harm. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions

to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by mail solicitations to church members in which the defendant falsely claims to be a fundraiser for the school, or a defendant who poses as a federal debt collection agent in order to fraudulently collect a delinquent student loan.

A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically-named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision.

Ongoing frauds usually result in multiple-count indictments. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level.

Albeit imperfect, dollar loss is a direct, objective measure of harm; it is therefore the primary factor appearing in the guideline. In keeping with the Commission's policy on attempts, if a probable or intended loss that the defendant was attempting to inflict can be determined, that larger figure would be used as the loss. For example, if the fraud consisted of attempting to sell \$40,000 in worthless securities, or representing that a forged check for \$40,000 was genuine, the "loss" would be treated as \$40,000 for purposes of this guideline.

The amount of loss need not be precise. The court is not expected to identify each victim and total his loss to arrive at a precise figure. It need only make an estimate of the range of loss that is reasonable given the available information. The estimate may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. Estimates based upon aggregate "market loss" (e.g., the aggregate decline in market value of a stock resulting from disclosure of information that was wrongfully withheld or misrepresented) are especially appropriate for securities cases. The offender's gross gain from committing the fraud is an alternative minimum estimate of the loss.

Dollar loss often does not fully capture the harmfulness and seriousness of the conduct. In such instances, departure may be appropriate. Examples may include the following:

- (a) The primary objective of the fraud was non-monetary;
- (b) False statements were made for the purpose of facilitating some other crime;
- (c) The offense caused or risked physical or psychological harm;

(d) The offense endangered national security or military readiness;

(e) The offense caused a loss of confidence in an important institution;

(f) Completion of the offense was prevented, or the offense was interrupted before it caused serious harm.

The adjustments for loss do not distinguish frauds involving losses greater than \$5,000,000. Departure above the applicable guideline may be appropriate in these unusual cases.

In a few instances, the total dollar loss that results from the offense may overstate its seriousness. Such situations occur most frequently when a misrepresentation is of limited materiality or is not the sole cause of the loss. Examples would include making a minor misrepresentation of fact in order to obtain a loan which the defendant expected, but was unable, to repay; attempting to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it; and making a misrepresentation in a securities offering that enabled the securities to be sold at inflated prices where the value of the securities subsequently declined in substantial part for other reasons. In such instances, the court may consider downward departure.

This factor is quite significant in current practice. Defendants who intentionally exploit vulnerable victims demonstrate a high degree of moral culpability. For example, a defendant who sells bogus "cures" for cancer to terminally ill victims or who solicits advance employment fees from unemployed victims for non-existent jobs would be subject to this provision.

Offenses that involve the use of transactions or accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect, and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum level of 12 is provided for these offenses.

Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. 1028 and 1029, are also covered by this guideline. The statutes provide for increased maximum terms of imprisonment for the use or possession of device-making equipment and the production or transfer of more than five identification documents or fifteen access devices. The court may wish to enhance the sentence for violations of these statutes in a manner similar to the treatment of analogous counterfeiting offenses under Part B.

§ 2F1.2. This guideline applies to certain violations of Rule 10b-5 that are commonly referred to as "insider trading." Insider trading is treated essentially as a sophisticated fraud. Because the victims and the victims' losses are difficult if not impossible to identify, the gain, i.e., the total increase in value realized by the defendant or tippees through trading in securities based upon inside information, is employed in its place.

## Part G—Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity

### 1. Prostitution

8 U.S.C. 1328

18 U.S.C. 2421–2423

#### § 2G1.1. Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct

(a) Base Offense Level: 14.

(b) Specific Offense Characteristics.

(1) If the defendant used physical force, or coercion by drugs or otherwise, increase by 4 levels.

#### § 2G1.2. Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct

(a) Base Offense Level: 16.

(b) Specific Offense Characteristics.

(1) If the offense involved the use of physical force, or coercion by drugs or otherwise, increase by 4 levels.

(2) If the conduct involved the transportation of a minor under the age of twelve years, increase by 4 levels.

(3) If the conduct involved the transportation of a minor at least twelve years of age but under the age of sixteen years, increase by 2 levels.

#### COMMENTARY

§ 2G1.1 (8 U.S.C. 1328, 18 U.S.C. 2422–2422). This section applies to offenses listed under the white slave traffic statutes.

Transportation for the purpose of prostitution or any other immoral purpose carries a statutory maximum penalty of five years' imprisonment. The enhancement for physical force or coercion anticipates no injury. In the infrequent case where the defendant did not commit the offense for commercial advantage and the offense did not involve physical force or coercion, the court may depart. The Commission recommends a downward departure of 8 levels.

§ 2G1.2 (8 U.S.C. 1328, 18 U.S.C. 2423). This section applies to conduct that involves the transportation of minors for immoral purposes. The statutory maximum penalty is ten years' imprisonment.

### 2. Sexual Exploitation of a Minor

8 U.S.C. 1328

18 U.S.C. 2251–2252

#### § 2G2.1. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material

(a) Base Offense Level: 25.

(b) Specific Offense Characteristics.

(1) If the minor was under the age of twelve years, increase by 2 levels.

#### § 2G2.2. Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor

(a) Base Offense Level: 13.

(b) Specific Offense Characteristics.

(1) If the material involved a minor under the age of twelve years, increase by 2 levels.

(2) If the offense involved distribution, increase by the number of levels from the table in § 2F1.1 corresponding to the retail value of the material, but in no event less than 5 levels.

#### COMMENTARY

§ 2G2.1 (8 U.S.C. 1328, 18 U.S.C. 2251). This offense commonly involves the production source of a child pornography enterprise. Because the offense directly involves the exploitation of minors, the base offense level is higher than for the distribution of the sexually explicit material after production. An enhancement is provided when the conduct involves the exploitation of a minor under age twelve to reflect the more serious nature of exploiting young children. Each minor child exploited shall be considered a separate offense.

§ 2G2.2 (18 U.S.C. 2252). This section refers to the distribution of materials that visually depict a minor or minors engaging in sexually explicit conduct. Distribution, here, is included within the broader term of "trafficking." The base offense level is substantially higher than that applicable to the distribution of obscene materials not involving minors (§ 2G3.1).

An enhancement is provided if the material depicted minors under age twelve. The enhancement for distribution provides significant punishment for defendants involved in large-scale operations.

### 3. Obscenity

18 U.S.C. 1461–1465

47 U.S.C. 223

#### § 2G3.1. Importing, Mailing, or Transporting Obscene Matter

(a) Base Offense Level: 6.

(b) Specific Offense Characteristics.

(1) If the offense involved an act related to distribution for pecuniary gain, increase by the number of levels from the table in § 2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels.

(2) If the offense involved material that portrays sadomasochistic conduct or other depictions of violence, increase by 4 levels.

(c) Cross Reference.

(1) If the offense involved a criminal enterprise, apply the appropriate guideline from Chapter Two, Part E (Offenses Involving Criminal Enterprises and Racketeering) if the resulting offense level is greater than that determined above.

#### § 2G3.2. Obscene or Indecent Telephone Communications

(a) Base Offense Level: 6.

#### COMMENTARY

§ 2G3.1 (18 U.S.C. 1461–1465). This section applies to offenses involving the mailing,

importation, and interstate transportation for sale or distribution of obscene materials. Because most federal prosecution is directed to acts related to distribution, the base offense level should usually be 11. The maximum penalty for these offenses is five years. When the obscenity distribution offense is part of a for-profit enterprise, the penalty is enhanced according to the retail value of the material involved, or by 5 levels, whichever is larger. As used in this guideline, the term "an act related to distribution" is to be broadly construed and includes production, transportation or possession for the purpose of distribution.

§ 2G3.2 (47 U.S.C. 223). The maximum statutory penalty is six months.

## Part H—Offenses Involving Individual Rights

### 1. Civil Rights

18 U.S.C. 241–242

18 U.S.C. 245–246

42 U.S.C. 3631

#### § 2H1.1. Going in Disguise to Deprive of Rights

(a) Base Offense Level (Apply the greater):

(1) 15; or

(2) 2 plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristics.

(1) If the defendant was a public official at the time of the offense, increase by 4 levels.

#### § 2H1.2. Conspiracy to Interfere With Civil Rights

(a) Base Offense Level (Apply the greater):

(1) 13; or

(2) 2 plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristics.

(1) If the defendant was a public official at the time of the offense, increase by 4 levels.

#### § 2H1.3. Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination

(a) Base Offense Level (Apply the greatest):

(1) 10, if no injury occurred; or

(2) 15, if injury occurred; or

(3) 2 plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristics

(1) If the defendant was a public official at the time of the offense, increase by 4 levels.

#### § 2H1.4. Interference with Civil Rights Under Color of Law

(a) Base Offense Level (Apply the greater):

(1) 10; or

(2) 2 plus the offense level applicable to any underlying offense.

#### **§ 2H1.5. Other Deprivations of Rights or Benefits in Furtherance of Discrimination**

(a) Base Offense Level (Apply the greater):

(1) 6; or

(2) 2 plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristic.

(1) If the defendant was a public official at the time of the offense, increase by 4 levels.

#### **COMMENTARY**

Guidelines in Part H refer to violations of civil rights statutes that typically penalize conduct involving force or violence more heavily than discriminatory or intimidating conduct not involving force or bodily injury.

§ 2H1.1, 2H1.2. Section 2H1.1 applies to intimidating activity by formally and informally organized groups as well as hate groups. Section 2H1.2 applies to conspiracies. These activities are proscribed by 18 U.S.C. § 241. The statutory maximum for violations of this statute is ten year's imprisonment unless death results. In each instance, the base offense level assumes threatening or otherwise serious conduct. The alternative offense level in § 2H1.1(a)(2) and § 2H1.2(a)(2) refers to the offense level for any underlying criminal conduct. For example, if the underlying offense involved a homicide, the alternative offense level would be the offense level from the guideline for the most comparable homicide offense in §§ 2A1.1–2A1.4 (Homicide) plus 2 levels. If the offense involved assault, criminal sexual conduct, kidnapping, abduction or unlawful restraint, the alternative offense level would be the offense level from the guideline for the most comparable offense in §§ 2A2.1–2A4.2 (Assault, Criminal Sexual Abuse, and Kidnapping, Abduction, or Unlawful Restraint) plus 2 levels, or if the offense involved attempt, conspiracy, or solicitation to commit such offenses, the offense level for such offense plus 2 levels. If the offense involved destruction of, or damage to property by means of arson or an explosive device, the alternative offense level would be the offense level from § 2K1.4 (Arson; Property Damage By Use of Explosives) plus 2 levels. If the offense involved property damage by other means, the alternative offense level would be the offense level from § 2B1.3 (Property Damage or Destruction (Other than by Arson or Explosives)) plus 2 levels. The addition of two levels reflects the fact that the harm involved both the underlying criminal conduct and activity intended to deprive a person of his civil rights. An added penalty is imposed on an offender who is a public official to reflect the likely damage to public confidence in the integrity and fairness of government, and the added likely force of the threat because of the official's involvement. Because it is included as a specific offense characteristic, the adjustment for abuse of position under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. Other

adjustments for role in the offense may be applicable, however.

§ 2H1.3. This section applies to violations of 18 U.S.C. 245, and to violations of 42 U.S.C. 3631 involving the threat or use of force. The maximum term of imprisonment for violations of these statutes is one year if no bodily injury occurs, ten years if bodily injury occurs, and life imprisonment if death results. The statutes provide federal protection for the exercise of civil rights in a variety of contexts (e.g., voting, employment, public accommodations, etc.). The base offense level reflects that force or threat of force is likely to be involved. It is established by analogy to similar crimes against the political process. An alternative offense level is provided in § 2H1.3(a)(3). See Commentary to § 2H1.1. Because it is included as a specific offense characteristic, the adjustment for abuse of position under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. Other adjustments for role in the offense may be applicable.

§ 2H1.4. This section applies to violations of 18 U.S.C. 242, which carries a statutory maximum of one year unless death results, in which case a sentence of life imprisonment is authorized. Given this one-year statutory maximum a base offense level of 10 is prescribed; however, the Commission intends to recommend that the maximum authorized penalty for offenses other than those where death results be increased. A guideline sentence near the statutory maximum is provided for cases not resulting in death because of the compelling public interest in deterring and adequately punishing those who violate civil rights under color of law. An alternative offense level is provided in § 2H1.4(a)(2). See Commentary to § 2H1.1. Being a public official is an element of this offense; an enhancement for public position under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) therefore does not apply. Other adjustments for role in the offense may be applicable.

§ 2H1.5. This section applies to violations of 18 U.S.C. 246 and 42 U.S.C. 3631. Violations of these statutes need not involve the use or threat of force and can vary in the harm caused. Accordingly, the guideline contains an alternative offense level in § 2H1.5(a)(2). See Commentary to § 2H1.1. Because it is included as a specific offense characteristic, the adjustment for abuse of position under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. Other adjustments for role in the offense may be applicable.

#### **2. Political Rights**

2 U.S.C. 437g(d)  
18 U.S.C. 241–242  
18 U.S.C. 245(b)(1)(A)  
18 U.S.C. 592–594  
18 U.S.C. 597  
18 U.S.C. 1341  
18 U.S.C. 1343  
42 U.S.C. 1973i, j

#### **§ 2H2.1. Obstructing an Election or Registration**

(a) Base Offense Level (Apply the greatest):

(1) 18, if the obstruction occurred by use of force or threat of force against persons or property; or

(2) 12, if the obstruction occurred by forgery, fraud, theft, bribery, deceit, or other means, except as provided in (3) below; or

(3) 6, if the defendant (A) solicited, demanded, accepted, or agreed to accept anything of value to vote, refrain from voting, vote for or against a particular candidate, or register to vote, (B) gave false information to establish eligibility to vote, or (C) voted more than once in a federal election.

#### **COMMENTARY**

§ 2H2.1. This section applies to violations of political rights, under 2 U.S.C. 437g(d), 18 U.S.C. 241, 242, 245(b)(1)(A), 592, 593, 594, 597, 1341, and 1343, and 42 U.S.C. 1973i and 1973j. Aggravating factors are provided for three major ways of obstructing an election distinguished in the various statutes: By force, by deceptive or dishonest conduct, or by bribery. If the use of force results in personal injury or property damage, or if the scheme to obstruct an election or registration involves corrupting a public official, e.g., a poll official, the sentence may be enhanced by applying the relevant provisions of Chapter Five, Part K (Departures). A defendant who is a public official or who directs others to engage in criminal conduct may have a sentence enhanced by reference to the provisions in Chapter Three, Part B (Role in the Offense).

#### **3. Privacy and Eavesdropping**

18 U.S.C. 1702  
18 U.S.C. 1905  
18 U.S.C. 2511–2512  
21 U.S.C. 842(a)(8)  
47 U.S.C. 605

#### **§ 2H3.1. Interception of Communications or Eavesdropping**

(a) Base Offense Level (Apply the greater):

(1) 9; or

(2) If the purpose of the conduct was to facilitate another offense, apply the guideline applicable to an attempt to commit that offense.

(b) Specific Offense Characteristic.

(1) If the purpose of the conduct was to obtain direct or indirect commercial advantage or economic gain not covered by § 2H3.1(a)(2) above, increase by 3 levels.

#### **§ 2H3.2. Manufacturing, Distributing, Advertising, or Possessing an Eavesdropping Device**

(a) Base Offense Level: 6.

(b) Specific Offense Characteristic.

(1) If the offense was committed for pecuniary gain, increase by 3 levels.

**§ 2H3.3. Obstructing Correspondence**

(a) Base Offense Level:

(1) 6; or

(2) If the conduct was theft of mail, apply § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft);

(3) If the conduct was destruction of mail, apply § 2B1.3 (Property Damage or Destruction (Other than by Arson or Explosives))

**COMMENTARY**

§ 2H3.1. This section refers to conduct proscribed by 47 U.S.C. 605, and the Electronic Communications Privacy Act of 1986, which amends 18 U.S.C. 2511 and other sections of Title 18 dealing with unlawful interception and disclosure of communications. These statutes proscribe the interception and divulging of wire, oral, radio, and electronic communications. The Electronic Communications Privacy Act of 1986 provides for a maximum term of imprisonment of five years for violations involving most types of communication. The interception of oral communications is punishable by a maximum of five years' imprisonment, while the interception of radio communications carries a maximum term of imprisonment of one year for the first conviction and a maximum term of imprisonment of two years for any subsequent conviction. The base offense level is 9, or if the offense was to facilitate the commission of another offense, the offense level that resulted from applying the guideline relevant to the underlying offense, whichever is greater. The base offense level of 9 is increased if the purpose of the conduct is commercial or economic gain. Offenses involving the interception of satellite cable transmissions for purposes of direct or indirect commercial advantage or private financial gain are covered under § 2B5.3 (Criminal Infringement of Copyright).

§ 2H3.2. This section applies to conduct proscribed by 18 U.S.C. 2512 covering eavesdropping devices. The offense level is enhanced if the conduct was engaged in for pecuniary gain.

§ 2H3.3. This section applies to violations of 18 U.S.C. 1702 involving the unlawful interception of correspondence. The same statute is sometimes used to prosecute cases more accurately described as theft or destruction of mail. In such cases, apply §§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or 2B1.3 (Property Damage or Destruction Other than by Arson or Explosives), respectively.

**4. Peonage, Involuntary Servitude, and Slave Trade**

18 U.S.C. 1581-1588

**§ 2H4.1. Peonage, Involuntary Servitude, and Slave Trade**

(a) Base Offense Level (Apply the greater):

(1) 15; or

(2) 2 plus the offense level applicable to any underlying offense.

**COMMENTARY**

This section applies to conduct proscribed by 18 U.S.C. 1581 through 1588. These statutes prohibit peonage, involuntary servitude, and slave trade. For purposes of deterrence and just punishment, the base offense level for these offenses is sufficiently high to ensure that a term of imprisonment will be imposed. However, these offenses frequently involve other serious offenses, in which event the offense level will be increased. See Commentary to § 2H1.1.

**Part J—Offenses Involving the Administration of Justice**

18 U.S.C. 201

18 U.S.C. 401-402

18 U.S.C. 912-913

18 U.S.C. 1073

18 U.S.C. 1503-1513

18 U.S.C. 1581(a)

18 U.S.C. 1621-1623

18 U.S.C. 3146-3147

**§ 2J1.1. Contempt**

If the defendant was adjudged guilty of contempt, the court shall impose a sentence based on stated reasons and the purposes of sentencing set forth in 18 U.S.C. 3553(a)(2).

**§ 2J1.2. Obstruction of Justice**

(a) Base Offense Level: 12.

(b) Specific Offense Characteristics:

(1) If the defendant obstructed or attempted to obstruct the administration of justice by causing or threatening to cause physical injury to a person or property, increase by 8 levels.

(2) If the defendant substantially interfered with the administration of justice, increase by 3 levels.

(c) Cross Reference:

(1) If the conduct was obstructing the investigation or prosecution of a criminal offense, apply § 2X3.1 (Accessory After the Fact) in respect to such criminal offense, if the resulting offense level is greater than that determined above.

**§ 2J1.3. Perjury**

(a) Base Offense Level: 12.

(b) Specific Offense Characteristics:

(1) If the defendant suborned perjury by causing or threatening to cause physical injury to a person or property, increase by 8 levels.

(2) If the defendant's perjury or subornation of perjury substantially interfered with the administration of justice, increase by 3 levels.

(c) Cross Reference:

(1) If the conduct was perjury in respect to a criminal offense, apply § 2X3.1 (Accessory After the Fact) in respect to such criminal offense, if the resulting offense level is greater than that determined above.

**§ 2J1.4. Impersonation**

(a) Base Offense Level: 6.

(b) Specific Offense Characteristic:

(1) If the defendant falsely represented himself as a federal officer, agent or employee to demand or obtain any money, paper, document, or other thing of value or to conduct an unlawful arrest or search, increase by 6 levels.

**§ 2J1.5. Failure to Appear by Material Witness**

(a) Base Offense Level:

(1) 6, if in respect to a felony; or

(2) 4, if in respect to a misdemeanor.

(b) Specific Offense Characteristic:

(1) If the offense substantially interfered with the administration of justice, increase by 3 levels.

**§ 2J1.6. Failure to Appear by Defendant**

(a) Base Offense Level: 6.

(b) Specific Offense Characteristics:

(1) If the underlying offense is punishable by death or imprisonment for a term of fifteen years or more, increase by 9 levels.

(2) If the underlying offense is punishable by a term of imprisonment of five or more years, but less than fifteen years, increase by 6 levels.

(3) If the underlying offense is a felony punishable by a maximum term of less than five years, increase by 3 levels.

**§ 2J1.7. Commission of Offense While on Release**

(a) Base Offense Level: 6.

(b) Specific Offense Characteristics:

(1) If the underlying offense is punishable by death or imprisonment for a term of fifteen years or more, increase by 6 levels.

(2) If the underlying offense is punishable by a term of imprisonment of five or more years, but less than fifteen years, increase by 4 levels.

(3) If the underlying offense is a felony punishable by a maximum term of less than five years, increase by 2 levels.

**§ 2J1.8. Bribery of Witness**

(a) Base Offense Level: 12.

(b) Specific Offense Characteristic:

(1) If the offense substantially interfered with the administration of justice, increase by 3 levels.

(c) Note:

(1) If the conduct was perjury in respect to a criminal offense, apply § 2X3.1 (Accessory After the Fact) in respect to such criminal offense, if the resulting offense level is greater than that determined above.

**§ 2J1.9. Payment to Witness**

(a) Base Offense Level: 6.

(b) Specific Offense Characteristic:

(1) If the payment was for refusing to testify, increase by 4 levels.

#### COMMENTARY

§ 2J1.1 (18 U.S.C. 401, 402). Misconduct constituting contempt varies significantly. The nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are context specific variables. Because the seriousness of a contempt violation can only be determined within the context of the often unique circumstances of the offense, the Commission leaves punishment to the discretion of the sentencing judge. Explicit factual findings must be made if the contempt occurred in the presence of the court and is summarily punished. Rule 42(a), Fed.R.Crim.P.

§ 2J1.2 (18 U.S.C. 1503-1513). This section addresses offenses involving obstruction of justice generally prosecuted under the referenced statutes. This guideline only applies to independent prosecutions and convictions for obstruction offenses. However, conduct constituting obstruction in connection with the investigation or prosecution of another offense may be a relevant sentencing consideration as post-offense conduct. See Chapter Three, Part C (Obstruction).

Numerous offenses of varying seriousness may constitute obstruction of justice: using threats or force to intimidate or influence a juror or federal officer (five-year statutory maximum); obstructing a civil or administrative proceeding (five-year maximum); stealing or altering court records (five-year maximum); unlawfully intercepting grand jury deliberations (one-year maximum); obstructing a criminal investigation (five-year maximum); obstructing a state or local investigation of illegal gambling (five-year maximum); using intimidation or force to influence testimony, alter evidence, evade legal process, or obstruct the communication of a judge or law enforcement officer (ten-year maximum); or causing a witness bodily injury or property damage in retaliation for providing testimony, information or evidence in a federal proceeding (ten-year maximum). The conduct that gives rise to the violation may therefore range from a mere threat to an act of extreme violence.

The specific offense characteristics reflect the more serious forms of obstruction. Substantial interference with the administration of justice results when there is a premature or improper termination of a felony investigation or where an indictment or a verdict is based upon perjury or false testimony or other false evidence, or where substantial governmental or court resources are unnecessarily expended as a result of the offense. Because the conduct covered by this guideline is frequently part of an effort to assist another person to escape punishment for a crime he has committed, an alternative reference to the guideline for accessory after the fact is made.

If a weapon was used or physical or psychological injury or property damage resulted from the commission of the offense,

a departure may be called for. See Chapter Five, Part K (Departures).

§ 2J1.3 (18 U.S.C. 1621-1623). This section applies to perjury and subornation of perjury, generally prosecuted under the referenced statutes. Under these provisions, the maximum statutory punishment is five years. This guideline only applies to independent prosecutions and convictions for perjury. Perjury and suborning perjury may be considered as an aggravating factor in sentencing for other offenses. See Chapter Three, Part C (Obstruction). The guidelines provide a higher penalty for perjury than the current practice estimate of ten-months imprisonment. The Commission believes that perjury should be treated similarly to obstruction of justice. Therefore, the same considerations for enhancing a sentence are applied in the specific offense characteristics, and an alternative reference to the guideline for accessory after the fact is made.

§ 2J1.4 (18 U.S.C. 912, 913). This section applies to impersonation of a federal officer, agent, or employee; and impersonation to unlawfully conduct a search or arrest. The statutory maximum for both offenses is three years.

§ 2J1.5 (18 U.S.C. 3146(b)(2)). This section applies to a failure to appear by a material witness. A term of imprisonment imposed for this offense runs consecutively to any other term of imprisonment imposed. The statutory maximum for a material witness failing to appear is one year. Substantial interference with the administration of justice is defined in the commentary to § 2J1.2.

§ 2J1.6 (18 U.S.C. 3146(b)(1)). This section applies to a failure to appear by a defendant who was released pending trial, sentencing, appeal, or surrender for service. The statutory maximum for the violation increases in relation to the statutory maximum punishment for the underlying offense. A sentence imposed for failure to appear runs consecutively to a sentence of imprisonment for any other offense. Id.

§ 2J1.7 (18 U.S.C. 3147). Section 2J1.7 implements a statutory sentencing enhancement for any offense committed by a defendant while on release. 18 U.S.C. § 3147. A mandatory minimum of two years' imprisonment is added to the sentence prescribed for the offense if it was a felony; a mandatory minimum of ninety-days imprisonment is added if the offense was a misdemeanor. If a sentence is enhanced under § 2J1.7, the adjustment for offenses committed by defendants in custody in § 4A1.2(d), (Criminal History Category), shall not apply.

§§ 2J1.8 and 2J1.9 (18 U.S.C. 201 (d), (e), (h), (i)). These sections apply to bribes and gratuities involving witnesses in federal proceedings. The offense levels correspond to those for bribing federal officials and approximate current practice estimates. Substantial interference with the administration of justice is defined in the commentary to § 2J1.2.

#### Part K—Offenses Involving Public Safety

18 U.S.C. 32-33

18 U.S.C. 81

18 U.S.C. 842 (a), (h), (i), (j), (k)

18 U.S.C. 844 (a), (b), (d), (f), (h), (i)

18 U.S.C. 1153

18 U.S.C. 1855

18 U.S.C. 2275

26 U.S.C. 5685

49 U.S.C. 1472(1)

#### 1. Explosives and Arson

##### § 2K1.1. Failure to Report Theft of Explosives

(a) Base Offense Level: 6.

##### § 2K1.2. Improper Storage of Explosives

(a) Base Offense Level: 6.

##### § 2K1.3. Unlawfully Trafficking In, Receiving, or Transporting Explosives

(a) Base Offense Level: 6.

(b) Specific Offense Characteristics.

(1) If any of the following applies, use the greatest:

(A) If the defendant's conduct involved any written or oral false or fictitious statement, false record, or misrepresented identification, increase by 4 levels.

(B) If the offense involved explosives that the defendant knew or had reason to believe were stolen, increase by 6 levels.

(C) If the defendant knowingly distributed explosives to a person under twenty-one years of age, to a person prohibited by state law or ordinance from receiving such explosives at the place of distribution, or to a person the defendant had reason to believe intended to transport such materials into a state in violation of the law of that state, increase by 4 levels.

(D) If the defendant was a person prohibited from receiving explosives under 18 U.S.C. 842(i), or if the defendant knowingly distributed explosives to a person prohibited from receiving explosives under 18 U.S.C. 842(i), increase by 10 levels.

(E) If a recordkeeping offense reflected an effort to conceal a substantive firearm offense, apply the guideline for the substantive offense.

##### § 2K1.4. Arson; Property Damage By Use of Explosives

(a) Base Offense Level: 6.

(b) Specific Offense Characteristics.

(1) If any of the following applies, use the greatest:

(A) If the defendant knowingly created a substantial risk of death or serious bodily injury, increase by 18 levels.

(B) If the defendant recklessly endangered the safety of another, increase by 14 levels.

(C) If the offense involved destruction or attempted destruction of a residence, increase by 12 levels.

(D) If the defendant used fire or an explosive to commit another offense that is a felony under federal law, or carried explosives during the commission of any offense that is a felony under federal law (i.e., the defendant is convicted under 18 U.S.C. 844(h)), increase by 7 levels.

(E) If the defendant endangered the safety of another person, increase by 4 levels.

(F) If a destructive device was used, increase by 2 levels.

(c) Cross References.

(1) If the defendant caused death, or intended to cause bodily injury, apply the most analogous guideline from Chapter Two, Part A, Offenses Against the Person, if the resulting offense level is higher than that determined above.

(2) Apply § 2B1.3 (Property Damage or Destruction), if the resulting offense level is higher than that determined above.

**§ 2K1.5. Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft**

(a) Base Offense Level: 9.

(b) Specific Offense Characteristics.

(1) If any of the following applies, use the greatest:

(A) If the defendant acted willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life (i.e., the defendant is convicted under 49 U.S.C. 1472(1)(2)), increase by 15 levels.

(B) If the defendant was prohibited by another federal law from possessing the weapon or material, increase by 2 levels.

(C) If the defendant's possession of the weapon or material would have been lawful but for 49 U.S.C. 1472(1) and he acted with mere negligence, decrease by 3 levels.

(2) If the defendant used the weapon or material in committing or attempting another offense, apply the guideline in respect to such other offense, or § 2X1.1 (Attempt or Conspiracy) if the resulting offense level is higher than that determined above.

**§ 2K1.6. Shipping, Transporting, or Receiving Explosives With Felonious Intent or Knowledge; Using or Carrying Explosives in Certain Crimes**

(a) Base Offense Level (Apply the greater):

(1) 18; or

(2) If the defendant committed the offense with intent to commit another offense against a person or property, apply § 2X1.1 (Attempt or Conspiracy) in respect to such other offense.

**COMMENTARY**

§§ 2K1.1 and 2K1.2 (18 U.S.C. 842 (k), (j), 844(b)). The conduct covered is generally a regulatory violation, punishable by a maximum term of one year imprisonment. A review of current sentencing practices under 18 U.S.C. 842(j) indicates that the majority of defendants receive probation.

§ 2K1.3 (18 U.S.C. 842 (a), (h), (i), 844(b)). This section applies to various forms of conduct proscribed by 18 U.S.C. 842, ranging from violations of a regulatory nature pertaining to licensees or persons otherwise lawfully involved in explosives commerce, to more serious violations that involve substantial danger to public safety. The majority of prosecutions are under 18 U.S.C. 842(a) and 18 U.S.C. 842(h).

§ 2K1.4 (18 U.S.C. 32, 33, 81, 844 (f), (h), (i), 1153, 1855, 2275). Review of arson presentence investigation reports indicates that many arson cases involve "malicious mischief," i.e., minor property damage under circumstances that do not present an appreciable danger. Many of these defendants receive probationary sentences. A low base offense level is therefore provided for these cases. Aggravating factors are provided where a defendant knowingly or recklessly endangered others, destroyed or attempted to destroy a residence, used fire or an explosive in the commission of a felony, used a destructive device, or otherwise endangered others.

§ 2K1.5 (49 U.S.C. 1472(1)). The applicable statute is a misdemeanor, except in the circumstances specified in 49 U.S.C. 1472(1)(2). An enhancement to ensure a maximum sentence is provided where the defendant was a person prohibited by federal law from possession of the weapon or material. A decrease is provided for simple negligence where the defendant was otherwise authorized to possess the weapon or material.

§ 2K1.6 (18 U.S.C. 844(d); 26 U.S.C. 5685). The base offense level is consistent with the time specified in the current parole guidelines.

**2. Firearms**

18 U.S.C. 922

18 U.S.C. 924

18 U.S.C. 929

26 U.S.C. 5861

**§ 2K2.1. Receipt, Possession, or Transportation of Firearms and Other Weapons by Prohibited Persons**

(a) Base Offense Level: 9.

(b) Specific Offense Characteristics.

(1) If the firearm was stolen or had an altered or obliterated serial number, increase by 1 level.

(2) If the defendant obtained or possessed the firearm solely for sport or recreation, decrease by 4 levels.

(c) Cross Reference.

(1) If the defendant used the firearm in committing or attempting another offense, apply the guideline in respect to such other offense, or § 2X1.1 (Attempt or Conspiracy) if the resulting offense

level is higher than that determined above.

**§ 2K2.2. Receipt, Possession, or Transportation of Firearms and Other Weapons in Violation of National Firearms Act**

(a) Base Offense Level: 12.

(b) Specific Offense Characteristics.

(1) If the firearm was stolen or had an altered or obliterated serial number, increase by 1 level.

(2) If the firearm was a silencer, increase by 4 levels.

(3) If the defendant obtained or possessed the firearm solely for sport, recreation or collection, decrease by 6 levels.

(c) Cross Reference.

(1) If the defendant used the firearm in committing or attempting another offense, apply the guideline for such other offense or § 2X1.1 (Attempt or Conspiracy), if the resulting offense level is higher than that determined above.

**§ 2K2.3. Prohibited Transactions in or Shipment of Firearms and Other Weapons**

(a) Base Offense Level:

(1) 12, if convicted under 26 U.S.C. 5861; or

(2) 6, otherwise.

(b) Specific Offense Characteristics.

(1) If the number of firearms unlawfully dealt in exceeded 5, increase as follows:

Number of firearms	Increase in level
(A) 6 to 10 .....	Add 1.
(B) 11 to 20 .....	Add 2.
(C) 21 to 50 .....	Add 3.
(D) 51 to 100 .....	Add 4.
(E) 101 to 200 .....	Add 5.
(F) more than 200 .....	Add 6.

(2) If any of the following applies, use the greatest:

(A) If the defendant knew or had reason to believe that a purchaser was a person prohibited by federal law from owning the firearm, increase by 2 levels.

(B) If the defendant knew or had reason to believe that a purchaser resided in another state in which he was prohibited from owning the firearm, increase by 1 level.

(C) If the defendant knew or had reason to believe that a firearm was stolen or had an altered or obliterated serial number, increase by 1 level.

(c) Cross Reference.

(1) If the defendant provided the firearm to another for the purpose of

committing another offense, or knowing that he planned to use it in committing another offense, apply § 2X1.1 (Attempt or Conspiracy) in respect to such other offense, if the resulting offense level is higher.

#### § 2K2.4. Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes

If the defendant, whether or not convicted of another crime, was convicted under 18 U.S.C. 924(c) or 929(a), the penalties are those required by statute.

#### COMMENTARY

§ 2K2.1 (18 U.S.C. 922 (a)(6), (g), (h)). 18 U.S.C. 922(g) and 922(h) prohibit certain persons from receiving or possessing firearms and certain other Weapons; 18 U.S.C. 922(a)(6), prohibits false statements concerning disqualification of the defendant from possessing them.

Under current sentencing practices, there is substantial sentencing variation for these crimes. From the Commission's investigations, it appears that the variation is attributable primarily to the wide variety of circumstances under which these offenses occur. Apart from the nature of the defendant's criminal history, his actual or intended use of the firearm is probably the most important factor in determining the sentence.

Statistics show that sentences average two to three months lower if the firearm involved is a rifle or an unaltered shotgun. This may reflect the fact that these weapons tend to be more suitable than others for recreational activities. However, some rifles or shotguns may be possessed for criminal purposes, while some handguns may be suitable primarily for recreation. Therefore, the guideline is not based upon the type of firearm.

Intended lawful use, as determined by the surrounding circumstances, is a mitigating factor. These circumstances include, among others, the number and type of firearms (sawed-off shotguns, for example, have few legitimate uses) and ammunition, the location and circumstances of possession, the defendant's criminal history (e.g., violent or non-violent), and the extent to which possession is limited by local law.

Available data are not sufficient to determine the effect a stolen firearm has on the average sentence. However, reviews of actual cases suggest that this is a factor that tends to result in more severe sentences. Independent studies show that stolen firearms are used disproportionately in the commission of crimes.

The firearm statutes often are used as a device to enable the federal court to exercise jurisdiction over offenses that otherwise could be prosecuted only under state law. For example, a convicted felon may be prosecuted for possessing a firearm if he used the firearm to rob a gasoline station. Such prosecutions result in high sentences because of the true nature of the underlying conduct. The cross reference deals with such cases.

§ 2K2.2 (26 U.S.C. 5861(b)-(1)). 26 U.S.C. 5861 prohibits the unlicensed receipt, possession, transportation, or manufacture of certain firearms, such as machine guns, silencers, rifles and shotguns with shortened barrels, and destructive devices. The offense is a felony with a maximum prison of ten years. For violations of 26 U.S.C. 5861(a), involving sales of such weapons, refer to § 2K2.3.

As with § 2K2.1, there is considerable variation in the sentences currently given for this offense. Some violations may be relatively technical. Sentences frequently are probationary. The most important consideration appears to be the defendant's intended use of or reason for possessing the firearm.

§ 2K2.3 (18 U.S.C. 922(a)(1), (a)(5), (b)(2), (b)(3), (d), (i), (j), (k), (1); 26 U.S.C. 5861(a)). This applies to a variety of offenses involving prohibited transactions in or transportation of firearms and certain other weapons. Considerable variation in sentencing for these offenses currently exists. Current practices identify the specific offense characteristics as likely sources of that variation.

§ 2K2.4. If the defendant was convicted under 18 U.S.C. 924(c) or 929(a), the penalties are mandatory and shall be imposed pursuant to the statute. Note, however, that many of the offense guidelines (e.g., § 2B3.1, Robbery) contain enhancements applicable solely to weapon use. If the defendant is sentenced under 18 U.S.C. 924(c), such enhancements should not be applied.

#### 3. Transportation of Hazardous Materials

49 U.S.C. 1809(b)

#### § 2K3.1. Unlawfully Transporting Hazardous Materials in Commerce

Apply the guideline provision for § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification).

#### COMMENTARY

§ 2K3.1 (49 U.S.C. 1809(b)). The conduct covered under this section is punishable by imprisonment for up to five years. It involves the same risks as the conduct covered under § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification). Accordingly, that guideline applies.

#### Part I—Offenses Involving Immigration, Naturalization, and Passports

##### 1. Immigration

8 U.S.C. 1182(a)

8 U.S.C. 1324–1328

#### § 2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien

(a) Base Offense Level: 6.

(b) Specific Offense Characteristics.

(1) If the defendant committed the offense for profit or with knowledge that the alien was excludable under 8 U.S.C.

1182(a)(27), (28), (29), increase by 3 levels.

(2) If the defendant previously has been convicted of bringing illegal aliens into the United States, increase by 2 levels.

#### § 2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 6.

(b) Specific Offense Characteristic.

(1) If the defendant previously has unlawfully entered or remained in the United States, increase by 2 levels.

#### § 2L1.3. Engaging in a Pattern of Unlawful Employment of Aliens

(a) Base Offense Level: 6.

#### COMMENTARY

§ 2L1.1 (8 U.S.C. 1324 (a)(1), (2), (4), 1327, and 1328, Section 112 of The Immigration Reform and Control Act of 1986).

This section concerns the most serious immigration offenses covered under The Immigration Reform and Control Act of 1986. By statute, a five-year maximum term of imprisonment is provided for smuggling or harboring illegal aliens in the case of a second or subsequent offense, an offense committed for commercial advantage, or any offense in which the alien is not presented to an immigration officer immediately upon arrival. In all other cases, the maximum term is one year. 8 U.S.C. 1324.

The offense level is increased if the defendant committed the offense for profit. This enhancement does not apply to defendants who are themselves being unlawfully transported and receive transportation costs in lieu of payment. Defendants assisting entry of aliens who intend to engage in unlawful activities or who are otherwise specifically excludable under 8 U.S.C. 1182(a) (27), (28), or (29), receive an enhanced penalty.

The enhancement for a prior conviction is in addition to any adjustment made for criminal history in Chapter Four.

If the alien was smuggled, transported, or harbored for immoral purposes (8 U.S.C. 1328), apply § 2G1.1, § 2G1.2, § 2G2.1, or § 2G2.2 as applicable. See Statutory Index.

§ 2L1.2 (8 U.S.C. 1325 and 1326). Repeated instances of deportation without criminal conviction may warrant a sentence at or near the maximum for the applicable guideline range.

§ 2L1.3 (Section 101 of The Immigration Reform and Control Act of 1986). This offense is specifically directed at defendants who engage in a pattern of unlawful employment of aliens. The statutory maximum penalty is six months' imprisonment.

#### 2. Naturalization and Passports

18 U.S.C. 1423–1429

18 U.S.C. 1542–1544

18 U.S.C. 1546

**§ 2L2.1. Trafficking in Evidence of Citizenship or Documents Authorizing Entry**

- (a) Base Offense Level: 6.
- (b) Specific Offense Characteristic.
- (1) If the defendant committed the offense for profit, increase by 3 levels.

**§ 2L2.2. Fraudulently Acquiring Evidence of Citizenship or Documents Authorizing Entry for Own Use**

- (a) Base Offense Level: 6.

**§ 2L2.3. Trafficking in a United States Passport**

- (a) Base Offense Level: 6.
- (b) Specific Offense Characteristic.
- (1) If the defendant committed the offense for profit, increase by 3 levels.

**§ 2L2.4. Fraudulently Acquiring or Improperly Using a United States Passport**

- (a) Base Offense Level: 6.

**§ 2L2.5. Failure to Surrender Canceled Naturalization Certificate**

- (a) Base Offense Level: 6.

**COMMENTARY**

§ 2L2.1 (18 U.S.C. 1425-1427, 1546, and Section 103 of The Immigration Reform and Control Act of 1986). The statutory maximum penalty is five years.

§ 2L2.2 (18 U.S.C. 1423, 1425, and 1546). The statutory maximum penalty is five years.

§ 2L2.3 (18 U.S.C. 1542, 1544). The statutory maximum penalty is five years.

§ 2L2.4 (18 U.S.C. 1543 and 1544). The statutory maximum penalty is five years.

§ 2L2.5 (18 U.S.C. 1428). The statutory maximum penalty is five years.

**Part M—Offenses Involving National Defense****1. Treason**

18 U.S.C. 2381

**§ 2M1.1. Treason**

- (a) Base Offense Level (Apply the greatest):

- (1) 43, if the conduct is tantamount to waging war against the United States; or
- (2) The offense level applicable to the most analogous offense; or
- (3) 24.

**COMMENTARY**

§ 2M1.1. This section sets forth the punishment for violations of 18 U.S.C. 2381. Treason carries a statutorily-mandated minimum sentence of five years' imprisonment; the maximum is death. Treason is a rarely-prosecuted offense encompassing a broad range of conduct. The guideline contemplates imposition of the maximum penalty in the most serious cases, with reference made to the most analogous guideline in lesser cases. However, in view of the mandatory minimum, the offense level must not be less than 24.

**2. Sabotage**

18 U.S.C. 2153-2156

42 U.S.C. 2284

**§ 2M2.1. Destruction of War Material, Premises, or Utilities**

- (a) Base Offense Level: 32.

**§ 2M2.2. Production of Defective War Material, Premises, or Utilities**

- (a) Base Offense Level: 32.

**§ 2M2.3. Destruction of National Defense Material, Premises, or Utilities**

- (a) Base Offense Level: 26.

**§ 2M2.4. Production of Defective National Defense Material, Premises, or Utilities**

- (a) Base Offense Level: 26.

**COMMENTARY**

Sections 2M2.1 and 2M2.2 apply to violations of 18 U.S.C. 2153 and 2154, respectively. These offenses represent extreme conduct. Both the high statutory maximum (thirty years) and the base offense level reflect this. Violations of these statutes are treated as the substantial equivalent of second degree murder.

Sections 2M2.3 and 2M2.4 apply to violations of 18 U.S.C. 2155 and 2156, respectively. The statutes carry a maximum term of imprisonment of ten years. The guidelines treat these offenses equally because they pose the same danger.

The guidelines for sabotage also apply to conduct prohibited under 42 U.S.C. 2284, i.e., sabotage of a nuclear production or utilization facility, nuclear waste storage facility, or nuclear fuel. While the statute does not make a wartime/peacetime distinction, it includes a provision for increasing the maximum term of imprisonment from five to ten years when the offense involves the intent to injure the United States or aid a foreign nation. Thus, these provisions are consistent with the wartime/peacetime distinctions that apply to war material, premises, and utilities.

**3. Espionage and Related Offenses**

18 U.S.C. 793-794

42 U.S.C. 2274 (a), (b)

42 U.S.C. 2275-2276

**§ 2M3.1. Gathering or Transmitting National Defense Information to Aid a Foreign Government**

- (a) Base Offense Level:

- (1) 42, if top secret information was gathered or transmitted; or
- (2) 37, otherwise.

**§ 2M3.2. Gathering National Defense Information**

- (a) Base Offense Level:

- (1) 35, if top secret information was gathered; or
- (2) 30, otherwise.

**6 2M3.3. Transmitting National Defense Information**

- (a) Base Offense Level:

- (1) 29, if top secret information was transmitted; or
- (2) 24, otherwise.

**§ 2M3.4. Losing National Defense Information**

- (a) Base Offense Level:

- (1) 18, if top secret information was lost; or
- (2) 13, otherwise.

**§ 2M3.5. Tampering with Restricted Data Concerning Atomic Energy**

- (a) Base Offense Level: 24.

**§ 2M3.6. Disclosure of Classified Cryptographic Information**

- (a) Base Offense Level:

- (1) 29, if top secret information was disclosed; or
- (2) 24, otherwise.

**§ 2M3.7. Unauthorized Disclosure to Foreign Government or a Communist Organization of Classified Information by Government Employee**

- (a) Base Offense Level:

- (1) 29, if top secret information was disclosed; or
- (2) 24, otherwise.

**§ 2M3.8. Receipt of Classified Information**

- (a) Base Offense Level:

- (1) 29, if top secret information was received; or
- (2) 24, otherwise.

**§ 2M3.9. Disclosure of Information Identifying a Covert Agent**

- (a) Base Offense Level:

- (1) 30, if the information was disclosed by a person with, or who had authorized access to classified information identifying a covert agent; or
- (2) 25, if the information was disclosed by a person with authorized access only to other classified information.

**COMMENTARY**

The Commission has set base offense levels in this section on the assumption that the information at issue bears a significant relation to the nation's security, and that the revelation will significantly and adversely affect security interests. When revelation is likely to cause little or no harm, the court may impose a sentence below the applicable guideline range.

The court may depart from the guidelines upon representation by the President or his duly authorized designee that the imposition of a sanction other than that authorized under the guidelines for espionage and related offenses is necessary to protect national security or further the objectives of the nation's foreign policy.

§ 2M3.1. This section applies to violations of 18 U.S.C. 794, the general espionage statute, and 42 U.S.C. 2274(a), 2274(b), and 2275 (that address communication of restricted data pertaining to nuclear material, weapons production, and use with reason to believe or intent that the data will be used to injure the United States or aid a foreign nation). Although life imprisonment may be imposed under any of these statutes, the death penalty also may be imposed for violations of 18 U.S.C. 794. Attempts and conspiracies to violate 18 U.S.C. 794 and 42 U.S.C. 2274(a), (b) and 2275 are subject to the same punishment as the completed offenses proscribed by those sections.

Offense level distinctions in this section are based on the classification of the information gathered or transmitted. The classifications in turn reflect the importance of the information to national security. Pursuant to Executive Order 12356, "Top Secret" information is information that, if disclosed, "reasonably could be expected to cause exceptionally grave damage to the national security." "Secret" information is information that, if disclosed, "reasonably could be expected to cause serious damage to the national security." "Confidential" information is information that, if disclosed, could reasonably be expected to cause damage to the national security.

§ 2M3.2. This section applies to violations of 18 U.S.C. 793 (a), (b), (c), and (g), which proscribe diverse forms of obtaining and transmitting national defense information with intent or reason to believe the information would injure the United States or be used to the advantage of a foreign government. Violations are subject to a maximum term of ten years' imprisonment.

§ 2M3.3. This section applies to violations of 18 U.S.C. 793 (d), (e), and (g). An offense is committed under those subsections whenever a "document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense" is willfully transmitted or communicated to a person not entitled to receive it. It need not be proven that the item was communicated with reason to believe that it could be used to the injury of the United States or the advantage of a foreign nation. The statute only requires such intent when intangible information is communicated under subsections (d) and (e).

The base offense level for § 2M3.3 is substantially lower than the base offense level for § 2M3.2 primarily because prosecutions under subsections (d) and (e) often do not involve defendants who have the intent or reason to believe the information could be used to injure the United States or aid a foreign nation. When such intent or reason to believe is present in a violation of subsection (d) or (e), § 2M3.2 applies.

§ 2M3.4. This section applies to violations of 18 U.S.C. 793(f). Offenses generally prosecuted under this statute do not involve subversive conduct on behalf of a foreign power, but rather the loss of classified information by a grossly negligent employee of the federal government or a federal contractor. The base offense level is higher if the information was classified top secret to

reflect the likely importance of such information to national security.

§ 2M3.5. This section applies to violations of 42 U.S.C. 2276.

§ 2M3.6. This section applies to violations of 18 U.S.C. 798, which proscribes the disclosure of classified information concerning cryptographic or communication intelligence to the detriment of the United States or for the benefit of a foreign government. The statutory maximum for violations of 18 U.S.C. 798 is ten years.

§ 2M3.7. This section applies to violations of 50 U.S.C. 783(b).

§ 2M3.8. This section applies to violations of 50 U.S.C. 783(c).

§ 2M3.9. This section applies to violations of 50 U.S.C. 421. The offense level distinctions in § 2M3.9 are based on distinctions in the underlying statute. Subsections (a) and (b) carry maximum terms of imprisonment of ten years and five years, respectively. Violations of subsection (c) carry a statutory maximum of three years imprisonment. The statute provides higher maximum punishments for those persons with higher security classifications and correspondingly higher obligations to maintain confidentiality. Accordingly, the guideline establishes the highest penalties for officials with authorized access to classified information identifying covert agents, and a lower penalty for officials with authorized access to classified information generally. Following the statutory language, the highest base offense level applies to persons who have access to classified information identifying a covert agent, as well as to those who previously had access. The guideline does not apply to violations of 50 U.S.C. 421 by defendants who disclosed such information without having or having had authorized access to classified information, including journalists; it only applies to violations by persons who have or previously had authorized access. Such disclosures may vary in the degree of harm they inflict, and the court should impose a sentence that reflects the harm.

#### 4. Evasion of Military Service

50 U.S.C. App. 462

##### § 2M4.1. Failure to Register and Evasion of Military Service

(a) Base Offense Level: 6.

(b) Specific Offense Characteristic:

(1) If the offense occurred while persons were being inducted into the armed services, other than in time of war or armed conflict, increase by 6 levels.

#### COMMENTARY

§ 2M4.1. The Commission has not considered the appropriate sanction for this offense when persons are being inducted during time of war or armed conflict.

#### 5. Prohibited Financial Transactions and Exports

22 U.S.C. 2778

50 U.S.C. App. 2401-2420

#### § 2M5.1. Evasion of Export Controls

(a) Base Offense Level: (Apply the greater):

- (1) 22, if national security or nuclear proliferation controls were evaded; or
- (2) 14.

#### § 2M5.2. Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License

(a) Base Offense Level (Apply the greater):

- (1) 22, if sophisticated weaponry was involved; or
- (2) 14.

#### COMMENTARY

In determining whether to depart from the base offense levels for export violations, the court may consider: whether the violation occurred during wartime; the degree to which the violation threatened a security interest; the volume of commerce involved; the extent of planning and sophistication; and whether there were multiple occurrences or transactions.

§ 2M5.1. This section applies to knowing or willful evasion of export controls in violation of 50 U.S.C. 2401-2420, the Export Administration Act. The statute provides for up to ten years imprisonment for willfully violating or conspiring to or attempting to violate the act with respect to controls as to the country of destination, and five years otherwise. 50 U.S.C. 2410 (a) and (b).

In addition to the provisions for imprisonment, 50 U.S.C. App. § 2410 contains provisions for criminal fines and forfeiture as well as civil penalties. The maximum fine for individual defendants is \$250,000. In the case of corporations, the maximum fine is five times the value of the exports involved or \$1 million, whichever is greater. When national security controls are violated, in addition to any other sanction, the defendant is subject to forfeiture of any interest in, security of, or claim against: any goods or tangible items that were the subject of the violation; property used to export or attempt to export that was the subject of the violation; and any proceeds obtained directly or indirectly as a result of the violation.

§ 2M5.2. This section applies to exports and imports of military arms, equipment, and services in violation of 22 U.S.C. 2778, the Arms Export Control Act. The statute requires that exports of military goods, equipment, and services be licensed by the Department of State's Office of Munitions Control.

#### 6. Atomic Energy

42 U.S.C. 2077

42 U.S.C. 2122

42 U.S.C. 2131

42 U.S.C. 2138

42 U.S.C. 2273

**§ 2M6.1. Unlawful Acquisition, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities**

(a) Base Offense Level: 30.

(b) Specific Offense Characteristic.

(1) If the offense was committed with intent to injure the United States or to aid a foreign nation, increase by 12 levels.

**§ 2M6.2. Violation of Other Federal Atomic Energy Agency Statutes, Rules, and Regulations**

(a) Base Offense Level (Apply the greater):

(1) 30, if the offense was committed with intent to injure the United States or to aid a foreign nation; or

(2) 6.

**COMMENTARY**

While relatively few prosecutions occur for offenses under this section, the conduct covered often involves potential threats to the nation's public health, safety, and security. Most of the prosecutions that occur under this section are for trespass on federal installations, and often involve protest or civil disobedience.

**§ 2M6.1.** This section deals with the acquisition of nuclear weapons and materials prohibited by 42 U.S.C. 2077(b), 2122, and 2131. It also applies to those violations of 18 U.S.C. 831 that involve similar conduct. These statutes make it unlawful to manufacture, obtain, transfer, deal in, or possess nuclear materials, devices, or facilities, or to conspire to or attempt to do so. The statutes provide a maximum life sentence for offenses intended to injure the United States or aid a foreign nation, and a maximum ten year sentence otherwise.

**§ 2M6.2.** This section applies to offenses related to nuclear energy not specifically addressed elsewhere. This provision covers violations of statutes as well as rules and regulations, license conditions, and orders of the Nuclear Regulatory Commission and the Department of Energy, including accidental discharge of radioactive materials. The maximum term of imprisonment for violations of some of these provisions may be up to twenty years if the offense was intended to injure the United States or aid a foreign government.

**Part N—Offenses Involving Food, Drugs, Agricultural Products, and Odometer Laws**

**1. Tampering**

18 U.S.C. 1365

**§ 2N1.1. Tampering or Attempting To Tamper With Consumer Products**

(a) Base Offense Level: 25.

**§ 2N1.2. Providing False Information or Threatening To Tamper With Consumer Products**

(a) Base Offense Level (Apply the greater):

(1) 16;

(2) If the offense involved extortion, apply § 2B3.2.

**§ 2N3.3. Tampering With Intent To Injure Business**

(a) Base Offense Level: 12.

**COMMENTARY**

The term "consumer product" means any food, drug, device, or cosmetic as defined in 21 U.S.C. 321 or any article, product, or commodity produced or distributed for consumption by individuals.

Section 2N1.1 applies to 18 U.S.C. 1365 (a) and (e). The base offense level under this section reflects the risk of death or serious injury posed to significant numbers of people by this type of product tampering. It is slightly lower than, but consistent with, attempted murder, which may pose a danger to only a single person.

Section 2N1.2 applies to 18 U.S.C. 1365 (c) and (d). The base offense level assumes extortion was not involved. If the offense involves extortion, apply the guideline for extortion, § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

Section 2N1.3 covers 18 U.S.C. 1365(b).

If death or physical or psychological injury results from product tampering, or if the target of a tampering suffers property damage or monetary losses, a departure may be appropriate. See Chapter Five, Part K (Departures).

**2. Food, Drugs, and Agricultural Products**

7 U.S.C. 150bb, 150gg

21 U.S.C. 115

21 U.S.C. 117

21 U.S.C. 122

21 U.S.C. 134-134e

21 U.S.C. 151-158

21 U.S.C. 331

21 U.S.C. 333

21 U.S.C. 458-461

21 U.S.C. 463

21 U.S.C. 466

21 U.S.C. 610-611

21 U.S.C. 614

21 U.S.C. 617

21 U.S.C. 619-620

21 U.S.C. 642-644

21 U.S.C. 676

42 U.S.C. 262

**§ 2N2.1. Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product**

(a) Base Offense Level: 6.

**COMMENTARY**

Section 2N2.1 applies to most regulatory crimes involving food, drugs, biological products, devices, cosmetics, and agricultural products. The guideline assumes a typical regulatory offense involving knowing conduct. Where only negligence is involved, a less serious penalty is appropriate. Regulatory violations that amount to fraud, bribery, revealing trade secrets, theft, and

destruction of property are more appropriately treated under other guidelines, such as fraud.

If there was a serious risk of death, serious injury, property damage, or other significant harm, the court should sentence at or near the statutory maximum.

**3. Odometer Laws and Regulations**

15 U.S.C. 1983-1988

15 U.S.C. 1990c

**§ 2N3.1. Odometer Laws and Regulations**

(a) Base Offense Level: 6.

(b) If more than one vehicle was involved, apply § 2F1.1 (Offenses Involving Fraud or Deceit).

**COMMENTARY**

This section applies to 15 U.S.C. 1983-1988 and 1990c as amended by Pub. L. 99-579, Oct. 28, 1986. The base offense level takes into account the deceptive aspect of the offense assuming only a single vehicle was involved. If the defendant's conduct reflected a pattern or practice, apply the guideline for fraud and deception, § 2F1.1.

**Part P—Offenses Involving Prisons and Correctional Facilities**

18 U.S.C. 751-752

18 U.S.C. 755

18 U.S.C. 1791-1793

28 U.S.C. 1826

**§ 2P1.1. Escape, Instigating or Assisting Escape**

(a) Base Offense Level:

(1) 13, if from lawful custody resulting from a conviction or as a result of a lawful arrest for a felony;

(2) 8, if from lawful custody awaiting extradition, pursuant to designation as a recalcitrant witness or as a result of a lawful arrest for a misdemeanor.

(b) Specific Offense Characteristics:

(1) If the use or the threat of force against any person was involved, increase by 5 levels.

(2) If the defendant escaped from non-secure custody and returned voluntarily within ninety-six hours, decrease the offense level under § 2P1.1(a)(1) by 7 levels or the offense level under § 2P1.1(a)(2) by 4 levels.

(3) If the defendant committed the offense while a correctional officer or other employee of the Department of Justice, increase by 2 levels.

**§ 2P1.2. Providing or Possessing Contraband in Prison**

(a) Base Offense Level:

(1) 23, if the object was a firearm or destructive device.

(2) 13, if the object was a weapon (other than a firearm or a destructive device), any object that might be used as a weapon or as a means of facilitating

escape, ammunition, LSD, PCP, or a narcotic drug.

(3) 6, if the object was an alcoholic beverage, United States or foreign currency, or a controlled substance (other than LSD, PCP, or a narcotic drug).

(4) 4, if the object was any other object that threatened the order, discipline, or security of the institution or the life, health, or safety of an individual.

(b) Specific Offense Characteristics.

(1) If the defendant committed the offense while a correctional officer or other employee of the Department of Justice, increase by 2 levels.

**§ 2P1.3. Engaging In, Inciting or Attempting to Incite a Riot Involving Persons in a Facility for Official Detention**

(a) Base Offense Level:

(1) 22, if the offense was committed under circumstances creating a substantial risk of death or serious bodily injury to any person.

(2) 16, if the offense involved a major disruption to the operation of an institution.

(3) 10, otherwise.

**§ 2P1.4. Trespass on Bureau of Prisons Facilities**

(a) Base Offense Level: 6.

**COMMENTARY**

§ 2P1.1. This section applies to conduct proscribed by 18 U.S.C. 751 and 752 and 28 U.S.C. 1826. If actual injury occurred during an escape, see Chapter Five, Part K (Departures). Non-secure custody refers to custody with no significant physical restraint (e.g., where a defendant walked away from a work detail outside the security perimeter of an institution; where a defendant failed to return to any institution from a pass or unescorted furlough; or where a defendant escaped from an institution with no physical perimeter barrier). Voluntary return is defined as returning voluntarily to the facility or voluntarily turning one's self in to a law enforcement authority as an escapee (not in connection with an arrest on other charges). § 2P1.1(b)(3) applies to conduct proscribed by 18 U.S.C. 755. If this subsection is used, no adjustment is made for § 3B1.3, Role in the Offense (Abuse of Position of Trust or Use of Special Skill).

§ 2P1.2. This section applies to conduct proscribed by 18 U.S.C. 1791. If § 2P1.2(b)(1) applies, no adjustment is made for § 3B1.3, Role in the Offense (Abuse of Position of Trust or Use of Special Skill).

§ 2P1.3. This section applies to conduct proscribed by 18 U.S.C. 1792. Three reference base offense levels are provided. If death or bodily injury resulted, see Chapter Five, Part K (Departures). In circumstances falling between the three offense level reference points, intermediate offense levels may be used depending upon the amount of injury or

property damage, and the extent of disruption to the corrections facility that resulted.

§ 2P1.4. This section applies to conduct proscribed by 18 U.S.C. 1793.

**Part Q—Offenses Involving the Environment**

**1. Environment**

7 U.S.C. 136j, 136i  
15 U.S.C. 2614–2615  
33 U.S.C. 403  
33 U.S.C. 406–407  
33 U.S.C. 411  
33 U.S.C. 1319  
33 U.S.C. 1321  
33 U.S.C. 1342  
33 U.S.C. 1415  
33 U.S.C. 1517(b)  
33 U.S.C. 1907–1908  
42 U.S.C. 300h–2, 300i–1  
42 U.S.C. 4912  
42 U.S.C. 6928(d), (e)  
42 U.S.C. 7413  
42 U.S.C. 9603  
43 U.S.C. 1816(a)  
43 U.S.C. 1822(b)

**§ 2Q1.1. Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants**

(a) Base Offense Level: 24.

**COMMENTARY**

§ 2Q1.1. (33 U.S.C. 1319(c)(3) and 42 U.S.C. 6928(e)). This section applies to offenses committed with knowledge that the violation placed another person in imminent danger of death or serious bodily injury. If death or serious bodily injury results, a departure may be appropriate. See Chapter Five, Part K (Departures).

**§ 2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification**

(a) Base Offense Level: 8.

(b) Specific Offense Characteristics.

(1)(A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment, increase by 6 levels; or

(B) If the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 9 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved transportation, treatment, storage, or

disposal without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

(6) If the offense involved a simple recordkeeping or reporting violation only, decrease by 2 levels.

**§ 2Q1.3. Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification**

(a) Base Offense Level: 6.

(b) Specific Offense Characteristics.

(1)(A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment, increase by 6 levels; or

(B) If the offense otherwise involved a discharge, release, or emission of a pollutant, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 11 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved a discharge without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

**COMMENTARY**

§ 2Q1.2. This section applies both to substantive violations of the statutes and regulations governing the handling of pesticides and toxic and hazardous substances and to recordkeeping offenses. 7 U.S.C. 136j–136i; 15 U.S.C. 2614, 2615; 33 U.S.C. 1319 (c)(1) and (c)(2); 42 U.S.C. 300h–2, 6928(d), 7413 and 9603 (c) and (d); and 43 U.S.C. 1350. The first four specific offense characteristics provide augmentations applicable when the offense involved a substantive violation. The last two specific offense characteristics pertain to recordkeeping offenses. The term "recordkeeping offense" as used in this guideline, and in § 2Q1.3, covers both recordkeeping and reporting offenses. It is to be broadly construed as including, without limitation, failure to report discharges, releases or emissions where required (e.g., 33 U.S.C. 1517(b), 1321(b)(5), 42 U.S.C. 9603(b), and 43 U.S.C. 1816(a) and 1822(b)), the giving of false information, failure to file other required reports or provide necessary information as well as failure to prepare, maintain or provide records as prescribed. Although recordkeeping or "regulatory" offenses throughout the remainder of the guidelines have a base offense level of 6,

§ 2Q1.2 prescribes a base offense level of 8 because of the inherently dangerous nature of hazardous and toxic substances and pesticides. A decrease in the base offense level, however, is provided by § 2Q1.2(b)(6) for a "simple recordkeeping or reporting violation" to cover those situations where there was no reason to believe that the recordkeeping offense would result in substantive environmental or related harm. This offense characteristic is applicable only where, although the defendant knew of the recordkeeping offense, he neither knew nor had reason to believe that any environmental or other substantive harm was likely.

A listing of hazardous and toxic substances in the guidelines would be impractical. Several federal statutes (or regulations promulgated thereunder) list toxics, hazardous wastes and substances, and pesticides. These lists, such as those of toxic pollutants for which effluent standards are published under the Federal Water Pollution Control Act (e.g., 33 U.S.C. 1317) as well as the designation of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (e.g., 42 U.S.C. 9601(14)), are revised from time to time. "Toxic" and "hazardous" are defined differently in various statutes, but the common dictionary meanings of the words are not significantly different. Section 2Q1.2 applies to pesticides and to substances designated toxic or hazardous at the time of the offense.

§ 2Q1.3. This section parallels § 2Q1.2 but applies to offenses concerning substances which are not pesticides and are not designated hazardous or toxic, usually punished under 33 U.S.C. 403, 406, 407, 411, 1319 (c)(1) and (c)(2), 1415(b), 1907, and 1908; and 42 U.S.C. §§ 4912 and 7413. Section 2Q1.2 has a higher base offense level than § 2Q1.3 because of the more dangerous nature of the substances involved. The term "recordkeeping offense" has the same broad meaning discussed in the commentary to § 2Q1.2, above. If the offense involved a pesticide or a hazardous or toxic substance, § 2Q1.2 applies.

The base offense levels for §§ 2Q1.2 and 2Q1.3 assume violations resulting from knowing conduct. If the violation resulted from mere negligence, a departure may be warranted. The specific offense characteristics in § 2Q1.3 are similar to those in § 2Q1.2 because similar environmental results can occur even if the contaminants are not specifically designated as hazardous. Therefore, the relevant factors in selecting the offense level are basically those described under § 2Q1.2.

These two sections of the guidelines apply to a wide range of conduct. The offense may involve large quantities of extremely hazardous or toxic materials or small quantities of far less dangerous pollutants. Therefore, depending upon the circumstances of the particular offense in question, the Commission recognizes that a departure from the prescribed guideline, as outlined in the applicable commentary, may be appropriate.

Subsections 2Q1.2(b)(1) and 2Q1.3(b)(1) assume a discharge or emission into the environment resulting in actual environmental contamination and attach

higher penalties to violations. Because of the wide range of potential conduct arising out of the handling of different quantities of materials with widely differing propensities, a departure either upward or downward may be warranted. Depending upon the resulting harm from the emission, release or discharge, the quality and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from the offense levels prescribed in these offense characteristics may be appropriate.

Subsections 2Q1.2(b)(2) and 2Q1.3(b)(2) apply to offenses where the public health is seriously endangered. Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be appropriate. If death or serious bodily injury results, a departure would be called for. See Chapter Five, Part K (Departures).

Subsections 2Q1.2(b)(3) and 2Q1.3(b)(3) provide an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. Depending upon the nature of the contamination involved, a departure of up to two levels either up or down could be necessary.

Subsections 2Q1.2(b)(4) and 2Q1.3(b)(4) apply where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. (33 U.S.C. 1342; and 42 U.S.C. 6928(d) (1) and (2)). Where a violation of a permit has occurred or where the violation involved a failure to obtain a required permit, depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels up or down from the base offense level prescribed may be appropriate.

In order to deter such conduct, §§ 2Q1.2(b)(5) and 2Q1.3(b)(5) set the offense level for a recordkeeping offense reflecting an effort to conceal a substantive environmental offense at the same level as the substantive offense.

Section 2Q1.2(b)(6) provides for a decrease in the base offense level prescribed by § 2Q1.2 for a "simple recordkeeping or reporting violation" as discussed above.

If the offense involved mishandling of nuclear material, apply § 2M6.2 (Violation of Other Federal Atomic Energy Statutes, Rules, and Regulations).

Where a defendant in an action involving an environmental offense has previously engaged in similar misconduct as established by a civil adjudication, or has failed to comply with an administrative order, and his criminal history category does not adequately reflect the seriousness of his past criminal conduct or the likelihood that he will commit further crimes, the court may consider such misconduct in imposing a sentence that departs from the applicable guideline range for the offense. Chapter Four, § 4A1.3 (Adequacy of Criminal History Category (Policy Statement)).

#### § 2Q1.4. Tampering or Attempted Tampering with Public Water System

(a) Base Offense Level: 18.

(b) Specific Offense Characteristics.

(1) If a risk of death or serious injury was created, increase by 6 levels.

(2) If the offense resulted in disruption of a public water system or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(3) If the offense resulted in an ongoing, continuous, or repetitive release of a contaminant into a public water system or lasted for a substantial period of time, increase by 2 levels.

(4) If the purpose of the offense was to influence government action or to extort money, increase by 6 levels.

#### § 2Q1.5. Threatened Tampering with Public Water System

(a) Base Offense Level: 10.

(b) Specific Offense Characteristics:

(1) If the threat or attempt resulted in disruption of a public water system or evacuation of a community or a substantial public expenditure, increase by 4 levels.

(2) If the purpose of the offense was to influence government action or to extort money, increase by 8 levels.

#### COMMENTARY

§§ 2Q1.4, 2Q1.5. These sections apply to the new 1986 tampering section codified at 42 U.S.C. 300i-1. Since intent to harm persons is an element of the tampering and attempted tampering offenses, it is included in the base offense levels. The statutory maximum sentence for tampering is five years, while the maximum sentence for attempted tampering is three years. Tampering or interference with a public water supply system has the potential for widespread and serious public health effects, justifying substantial base offense levels. Given the similarity between tampering and the offenses covered by § 2Q1.2, the specific offense characteristics and the factors to be taken into account in choosing among offense levels are similar.

Sections 2Q1.4(b)(4) and 2Q1.5(b)(2) take into account the fact that public water supplies are vulnerable targets for terrorists and extortionists.

#### 2. Conservation and Wildlife

16 U.S.C. 668(a)

16 U.S.C. 707

16 U.S.C. 1029

16 U.S.C. 1030(b)

16 U.S.C. 1174(a)

16 U.S.C. 1338(a)

16 U.S.C. 1375(b)

16 U.S.C. 1540(b)

16 U.S.C. 2435

16 U.S.C. 2438

16 U.S.C. 3373(d)

18 U.S.C. 545

#### § 2Q2.1. Specially Protected Fish, Wildlife, and Plants

(a) Base Offense Level: 6.

## (b) Specific Offense Characteristics:

(1) If the offense involved a commercial purpose, increase by 2 levels.

(2) If the offense involved fish, wildlife, or plants that were not quarantined as required by law, increase by 2 levels.

## (3) Apply the greater:

(A) If the market value of the specially protected fish, wildlife, or plants exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit); or

(B) If the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation, increase by 4 levels.

**§ 2Q2.2. Lacey Act; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants**

## (a) Base Offense Level:

(1) 6, if the defendant knowingly imported or exported fish, wildlife, or plants, or knowingly engaged in conduct involving the sale or purchase of fish, wildlife, or plants with a market value greater than \$350; or

## (2) 4.

## (b) Specific Offense Characteristics:

(1) If the offense involved a commercial purpose, increase by 2 levels.

(2) If the offense involved fish, wildlife, or plants that were not quarantined as required by law, increase by 2 levels.

## (3) Apply the greater:

(A) If the market value of the fish, wildlife, or plants exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit); or

(B) If the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation, increase by 4 levels.

**COMMENTARY**

§ 2Q2.1. This section applies to violations of the Endangered Species Act, 16 U.S.C. 1540(b); the Bald Eagle Protection Act, 16 U.S.C. 668(a); the Migratory Bird Treaty Act, 16 U.S.C. 707; the Marine Mammal Protection Act, 16 U.S.C. 1375(b); the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. 1338(a); and the Fur Seal Act, 16 U.S.C. 1174(a). These statutes provide special protection to particular species of fish, wildlife, or plants. The base offense level for these statutes is low. However, enhanced punishment is warranted where the offense involved a commercial purpose, the species were not quarantined as required by law, or the market value of the protected species was

substantial. The Commission recognizes that an offense may have a serious impact upon protected species, even though the market value is negligible. In such circumstances if the species is either endangered or threatened, the greater enhancement of §§ 2Q2.1(3)(A) and (3)(B) should be applied.

§ 2Q2.2. This section applies to violations of the Lacey Act Amendments of 1981, 16 U.S.C. 3373(d), and to violations of 18 U.S.C. 545 where the smuggling activity involved fish, wildlife, or plants. These are the principal enforcement statutes utilized to combat interstate and foreign commerce in illegally taken fish, wildlife, and plants. The Lacey Act distinguishes between knowing violations and those where the offender "should have known;" the guidelines retain that distinction. The offense level for violations is enhanced if the market value of the fish, wildlife, or plants exceeds \$2,000 or if the species is either endangered or threatened.

**Part R—Antitrust Offenses****15 U.S.C. 1****§ 2R1.1. Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors**

## (a) Base Offense Level: 9.

## (b) Specific Offense Characteristics.

(1) If the conduct involved participation in an agreement to submit non-competitive bids, increase by 1 level.

(2) If the volume of commerce attributable to the defendant was less than \$1,000,000 or more than \$4,000,000, adjust the offense level as follows:

Volume of commerce	Adjustment to offense level
(A) Less than \$1,000,000.....	Subtract 1.
(B) \$1,000,000 to \$4,000,000 ..	No adjustment.
(C) \$4,000,001 to \$15,000,000.	Add 1.
(D) \$15,000,001 to \$50,000,000.	Add 2.
(E) Over \$50,000,000.....	Add 3.

For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.

## (c) Fines.

A fine shall be imposed in addition to any term of imprisonment. The guideline fine range for an individual conspirator is from 4 to 10 percent of the volume of

commerce, but not less than \$20,000. The fine range for an organization is from 20 to 50 percent of the volume of commerce, but not less than \$100,000.

**COMMENTARY**

These guidelines apply to violations of the antitrust laws. Although they are not unlawful in all countries, there is near universal agreement that restrictive agreements among competitors such as horizontal price-fixing (including bid rigging) and horizontal market-allocation can cause serious economic harm. There is no consensus, however, about the harmfulness of other types of antitrust offenses, which furthermore are rarely prosecuted and may involve unsettled issues of law. Consequently, only one guideline, which deals with horizontal agreements in restraint of trade, has been promulgated. The controlling consideration is general deterrence.

§ 2R1.1 (15 U.S.C. 1). The agreements among competitors covered by this section—such as horizontal price-fixing and bid-rigging—are almost invariably covert conspiracies that are intended to and serve no purpose other than to restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal per se, i.e., without any inquiry in individual cases as to their actual competitive effect. The Commission believes that the most effective method to deter individuals from committing this crime is through imposing short prison sentences coupled with large fines. The guideline is designed with that purpose in mind.

Under the guidelines prison terms should be much more common, and usually longer, than is currently typical. Absent adjustments, the guidelines require confinement of four months or longer in the great majority of cases that are prosecuted, including all bid-rigging cases. The court will have the discretion to impose considerably longer sentences within the guideline ranges. It is the intent of the Commission that alternatives to imprisonment such as community confinement and home confinement not be available for antitrust offenders. Adjustments from Chapter Three, Part E (Acceptance of Responsibility) and, in rare instances, Chapter Three, Part B (Role in the Offense), may decrease these minimum sentences; nonetheless, in very few cases will the guidelines not require that some confinement be imposed. Adjustments will not affect the level of fines.

The guideline imprisonment terms represent a substantial change from present practice. Currently, approximately 39 percent of all individuals convicted of antitrust violations are imprisoned. Considering all defendants sentenced, the average time served is only forty-five days. The guideline prison terms are, however, consistent with the parole guidelines. The fines specified in the guideline represent substantial increases over existing practice. The current average fine for individuals is only approximately \$27,000; for corporations, it is approximately \$160,000.

Tying the offense level to the scale or scope of the offense is important in order to ensure that the sanction is in fact punitive and that there is an incentive to desist from a violation once it has begun. The offense levels are not based directly on the damage caused or profit made by the defendant because damages are difficult and time consuming to establish. The volume of commerce is an acceptable and more readily measurable substitute. The limited empirical data currently available show that fines increase with the volume of commerce and the term of imprisonment probably does so also.

The Commission believes that the volume of commerce is liable to be an understated measure of seriousness in some bid-rigging cases. For this reason, and consistent with current practice, the Commission has specified a 1 level increase for bid-rigging. Understatement of seriousness is especially likely in cases involving complementary bids. If, for example, the defendant participated in an agreement not to submit a bid, or to submit an unreasonably high bid, on one occasion, in exchange for his being allowed to win a subsequent bid that he did not in fact win, his volume of commerce would be zero, although he would have contributed to harm that possibly was quite substantial. The court should consider sentences near the top of the guideline range in such cases.

Substantial fines are an essential part of the sanction. It is estimated that the average additional profit attributable to price fixing is 10 percent of the selling price. The Commission has specified that a fine from two to five times that amount be imposed on organizational defendants as a deterrent because of the difficulty in identifying violators. Additional monetary penalties can be provided through private treble damage actions. A lower fine is specified for individuals. The statutory maximum fine is \$250,000 for individuals and \$1,000,000 for organizations, but is increased when there are convictions on multiple counts.

In setting the fine for individuals, the court should consider the extent of the defendant's participation in the offense, his role, and the degree to which he personally profited from the offense (including salary, bonuses, and career enhancement). The Commission believes that most antitrust defendants have the resources and earning capacity to pay these fines, at least over time, and will monitor the level of fines that are imposed and actually paid. If the court concludes that the defendant lacks the ability to pay the guideline fine, it should impose community service in lieu of a portion of the fine. The community service should be equally burdensome as a fine.

In setting the fine for an organization, the court should consider whether the organization encouraged or took steps to prevent the violation, whether high-level management was aware of the violation, and whether the organization previously engaged in antitrust violations. In addition, the court should consider that the average level of mark-up due to price-fixing may tend to decline with the volume of commerce involved.

Because the guideline sentences depend on the volume of commerce done by each firm,

role in the offense is implicitly taken into account. Thus, an increase for role under § 3B1.1 might be appropriate only where a defendant coerced others into participating in a conspiracy from which his firm did not profit significantly—an unlikely circumstance. Conversely, a decrease for role under § 3B1.2 would not be appropriate merely because a defendant's firm did not profit substantially. An individual should be considered for a downward adjustment for a mitigating role in the offense only if he was responsible merely for a small portion of his firm's participation in the conspiracy. For example, a complementary bidder who did not win a bid would not qualify for a downward adjustment.

Sentences at or even above the guideline maximum may be appropriate for individuals with previous antitrust convictions.

#### Part S—Money Laundering and Monetary Transaction Reporting

18 U.S.C. 371, 1001, 1005–1008, 1014

18 U.S.C. 1956, 1957

31 U.S.C. 5313, 5314, 5316, 5322, 5324

##### § 2S1.1. Laundering of Monetary Instruments

(a) Base Offense Level:

(1) 23, if convicted under 18 U.S.C. 1956(a)(1)(A) or (a)(2)(A);

(2) 20, otherwise.

(b) Specific Offense Characteristics.

(1) If the defendant knew that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 3 levels.

(2) If the value of the funds exceeded \$100,000, increase the offense level as follows:

Value	Increase in level
(A) \$100,000 or less.....	No increase.
(B) \$100,001 to \$200,000.....	Add 1.
(C) \$200,001 to \$350,000.....	Add 2.
(D) \$350,001 to \$600,000.....	Add 3.
(E) \$600,001 to \$1,000,000.....	Add 4.
(F) \$1,000,001 to \$2,000,000.....	Add 5.
(G) \$2,000,001 to \$3,500,000.....	Add 6.
(H) \$3,500,001 to \$6,000,000.....	Add 7.
(I) \$6,000,001 to \$10,000,000.....	Add 8.
(J) \$10,000,001 to \$20,000,000.....	Add 9.
(K) \$20,000,001 to \$35,000,000....	Add 10.
(L) \$35,000,001 to \$60,000,000....	Add 11.
(M) \$60,000,001 to \$100,000,000....	Add 12.
(N) more than \$100,000,000.....	Add 13.

##### § 2S1.2. Engaging in Monetary Transactions in Property Derived From Specified Unlawful Activity

(a) Base Offense Level: 17.

(b) Specific Offense Characteristics.

(1) If the defendant knew that the funds were the proceeds of:

(A) An unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 5 levels;

(B) Any other specified unlawful activity (see 18 U.S.C. 1956(c)(7)), increase by 2 levels.

(2) If the value of the funds exceeded \$100,000, increase the offense level as specified in § 2S1.1(b)(2).

##### § 2S1.3. Failure To Report Monetary Transactions; Structuring Transactions To Evade Reporting Requirements

(a) Base Offense Level:

(1) 13, if the defendant:

(A) Structured transactions to evade reporting requirements;

(B) Made false statements to conceal or disguise the activity; or

(C) Reasonably should have believed that the funds were the proceeds of criminal activity;

(2) 5, otherwise.

(b) Specific Offense Characteristics.

(1) If the defendant reasonably believed that the funds were criminally derived, increase by 5 levels.

(2) If the base offense level is from (a)(1) above and the value of the funds exceeded \$100,000, increase the offense level as specified in § 2S1.1(b)(2).

##### COMMENTARY

Money laundering activities are essential to the operation of organized crime. Congress has recently increased the maximum penalties for these offenses. The guidelines provide substantial punishments for these offenses. In fiscal year 1985, the time served by defendants convicted of felonies involving monetary transaction reporting under 31 U.S.C. §§ 5313, 5316, and 5322 averaged about ten months, and only a few defendants served as much as four to five years. However, courts have been imposing higher sentences as they come to appreciate the seriousness of this activity, and sentences as long as thirty-five years have been reported. Congress has demonstrated its intent to increase the sanctions for money laundering offenses by making all reporting violations felonies in 1984, and by enacting the Money Laundering Control Act of 1986 (18 U.S.C. 1956, 1957), which creates new offenses and provides higher maximum sentences for similar conduct when knowledge, facilitation or concealment of serious criminal activity is proved.

§ 2S1.1. This section applies to violations of 18 U.S.C. 1956. That statute is a part of the Anti-Drug Abuse Act of 1986 that prohibits financial transactions involving funds that are the proceeds of "specified unlawful activity," if such transactions are intended to facilitate that activity, or conceal the nature of the proceeds or avoid a transaction reporting requirement. The maximum term of imprisonment specified is twenty years.

In keeping with the clear intent of the legislation, this guideline provides for

substantial punishment. The punishment is higher than that specified in § 2S1.2 and § 2S1.3 because of the higher statutory maximum, and the added elements as to source of funds, knowledge and intent.

A higher base offense level is specified if the defendant is convicted under 18 U.S.C. 1956(a)(1)(A) or (a)(2)(A) because those subsections apply to defendants who did not merely conceal a serious crime that had already taken place, but encouraged or facilitated the commission of further crimes.

The amount of money involved is included as a factor because it is an indicator of the scope of the criminal enterprise as well as the degree of the defendant's involvement. Narcotics trafficking is included as a factor because of the clearly expressed Congressional intent to adequately punish persons involved in that activity.

§ 2S1.2. This section applies to violations of 18 U.S.C. 1957. That statute is a part of the Anti-Drug Abuse Act of 1986 prohibiting monetary transactions that exceed \$10,000 and involve the proceeds of "specified unlawful activity" (as defined in 18 U.S.C. 1956), knowing that the funds were "criminally derived property." The maximum term of imprisonment specified is ten years.

The statute is similar to 18 U.S.C. 1956, but does not require that the recipient exchange or "launder" the funds, that he have knowledge that the funds were proceeds of a specified unlawful activity, nor that he have any intent to further or conceal such an activity. In keeping with the intent of the legislation, this guideline provides for substantial punishment. The offense levels are higher than in § 2S1.3 because of the higher statutory maximum and the added element of knowing that the funds were criminally derived property.

The 2-level increase in subsection (b)(1) applies if the defendant knew that the funds were not merely criminally-derived, but were in fact the proceeds of a specified unlawful activity. Such a distinction is not made in § 2S1.1, because the level of intent required in that section effectively precludes an inference that the defendant was unaware of the nature of the activity.

§ 2S1.3. This section applies to violations of 31 U.S.C. 5313, 5314, 5316, 5322, and 5324, which relate to records and reports of certain transactions involving currency and monetary instruments. The maximum prison sentence for these offenses is ten years if there is any pattern of unlawful activity. These offenses sometimes are prosecuted as conspiracies, frauds, or false statements under 18 U.S.C. 371, 1001, 1005-1008, or 1014.

The base offense level is set at 13 for the great majority of cases. However, the base offense level is set at 5 for those cases in which these offenses may be committed with innocent motives and the defendant reasonably believed that the funds were from legitimate sources. The higher base offense level applies in all other cases. The offense level is increased by 5 levels if the defendant knew that the funds were criminally derived.

The dollar value of the transactions not reported is an important sentencing factor, except in rare cases. It is an indicator of several factors that are pertinent to the sentence, including the size of the criminal

enterprise, and the extent to which the defendant aided the enterprise.

## Part T—Offenses Involving Taxation

### 1. Income Taxes

26 U.S.C. 7201-7207

26 U.S.C. 7215

#### § 2T1.1. Tax Evasion

(a) Base Offense Level: Level from § 2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the "tax loss" is the greater of: (A) The total amount of tax that the taxpayer evaded or attempted to evade, including interest to the date of filing of an indictment or information; and (B) the "tax loss" defined in § 2T1.3. When more than one year is involved, the tax losses are to be added.

(b) Specific Offense Characteristics.

(1) If (A) the defendant failed to report income exceeding \$10,000 per year from criminal activity, or (B) the offense concealed or furthered criminal activity from which the defendant derived a substantial portion of his income, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(2) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

#### § 2T1.2. Willful Failure To File Return, Supply Information, or Pay Tax

(a) Base Offense Level:

(1) 1 level less than the level from § 2T4.1 (Tax Table) corresponding to the tax loss; or

(2) 5, if there is no tax loss.

For purposes of this guideline, "tax loss" means the total amount of tax that the taxpayer owed and did not pay, but, in the event of a failure to file in any year, not less than 10 percent of the amount by which the taxpayer's gross income for that year exceeded \$20,000.

(b) Specific Offense Characteristics

(1) If (A) the defendant failed to report income exceeding \$10,000 per year from criminal activity, or (B) the offense concealed or furthered criminal activity from which the defendant derived a substantial portion of his income, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(2) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

#### § 2T1.3. Fraud and False Statements Under Penalty of Perjury

(a) Base Offense Level:

(1) Level from § 2T4.1 (Tax Table) corresponding to the tax loss, if the offense was committed in order to facilitate evasion of a tax; or

(2) 6, otherwise.

For purposes of this guideline, the "tax loss" is 28 percent of the amount by which the greater of gross income and taxable income was understated, plus 100 percent of the total amount of any false credits claimed against tax. If the taxpayer is a corporation, use 34 percent in lieu of 28 percent.

(b) Specific Offense Characteristics.

(1) If (A) the defendant failed to report income exceeding \$10,000 per year from criminal activity, or (B) the offense concealed or furthered criminal activity from which the defendant derived a substantial portion of his income, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(2) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

#### § 2T1.4. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

(a) Base Offense Level:

(1) Level from § 2T4.1 (Tax Table) corresponding to the resulting tax loss, if any; or

(2) 6, otherwise.

For purposes of this guideline, the "tax loss" is the tax loss, as defined in § 2T1.3, resulting from the defendant's aid, assistance, procurement or advice.

(b) Specific Offense Characteristics

(1) If the defendant committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income, increase by 2 levels.

(2) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

(3) If the defendant was in the business of preparing or assisting in the preparation of tax returns, increase by 2 levels.

#### § 2T1.5. Fraudulent Returns, Statements, or Other Documents

(a) Base Offense Level: 6.

#### § 2T1.6. Failing to Collect or Truthfully Account for and Pay Over Tax

(a) Base Offense Level: Level from § 2T4.1 (Tax Table) corresponding to the tax not collected or accounted for and paid over, plus interest.

**§ 2T1.7. Failing to Deposit Collected Taxes in Trust Account as Required After Notice**

(a) Base Offense Level (Apply the greater):

- (1) 4; or
- (2) 5 less than the level from § 2T4.1 (Tax Table) corresponding to the amount not deposited.

**§ 2T1.8. Offenses Relating to Withholding Statements**

(a) Base Offense Level: 4.

**§ 2T1.9. Conspiracy to Impair, Impede or Defeat Tax**

(a) Base Offense Level (Apply the greater):

- (1) Offense level determined from § 2T1.1 or § 2T1.3, as applicable; or
  - (2) 10.
  - (b) Specific Offense Characteristics.
- If either of the following adjustments applies, use the greater:
- (1) If the offense involved the planned or threatened use of violence, increase by 4 levels.
  - (2) If the conduct was intended to encourage persons other than or in addition to coconspirators to violate the internal revenue laws or impede or impair the Internal Revenue Service in the assessment and collection of revenue, increase by 2 levels.

**2. Alcohol and Tobacco Taxes**

26 U.S.C. 5601-5605, 5607, 5608

26 U.S.C. 5661, 5671, 5697, 5762

**§ 2T2.1. Non-Payment of Taxes**

(a) Base Offense Level: Level from § 2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the "tax loss" is the amount of taxes that the taxpayer failed to pay or attempted not to pay.

**§ 2T2.2. Regulatory Offenses**

(a) Base Offense Level: 4.

**3. Customs Taxes**

18 U.S.C. 496

18 U.S.C. 541-545, 547, 548, 550, 551

18 U.S.C. 1951

19 U.S.C. 283, 1436, 1464, 1465, 1568(e), 1708(b)

**§ 2T3.1. Evading Import Duties or Restrictions (Smuggling)**

(a) Base Offense Level: Level from § 2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the "tax loss" is the amount of the duty.

**§ 2T3.2. Receiving or Trafficking in Smuggled Property**

(a) Base Offense Level: Level from § 2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the "tax loss" is the amount of the duty.

**4. Tax Table****§ 2T4.1. Tax Table**

Tax loss	Offense level
(A) Less than \$2,000 .....	6
(B) \$2,000 to \$5,000 .....	7
(C) \$5,001 to \$10,000 .....	8
(D) \$10,001 to \$20,000 .....	9
(E) \$20,001 to \$40,000 .....	10
(F) \$40,001 to \$80,000 .....	11
(G) \$80,001 to \$150,000 .....	12
(H) \$150,001 to \$300,000 .....	13
(I) \$300,001 to \$500,000 .....	14
(J) \$500,001 to \$1,000,000 .....	15
(K) \$1,000,001 to \$2,000,000 .....	16
(L) \$2,000,001 to \$5,000,000 .....	17
(M) More than \$5,000,000 .....	18

**COMMENTARY**

The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Especially in light of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, however, deterring others from violating the tax laws is the primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.

**1. Offenses Involving Income Taxes**

This part deals with criminal violations of the internal revenue laws. The offense levels have been set independently of those for offenses such as fraud or theft because the collection of taxes involves a unique governmental interest and estimates of the level of evasion are extremely high.

§ 2T1.1. This section applies to convictions under 26 U.S.C. 7201. False statements in furtherance of the evasion (see §§ 2T1.3, 2T1.5, and 2T1.8) are considered part of the offense for purposes of this guideline.

This guideline relies most heavily on the amount of tax evaded because the chief interest protected by the statute is the collection of taxes. A greater evasion is obviously more harmful to the treasury, and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from tax evasion increases, the sanction necessary to deter also increases.

For purposes of the guideline, the tax loss is the amount of tax that the taxpayer evaded or attempted to evade, plus interest to the date of the filing of an indictment or

information. The tax loss does not include penalties. The court is to determine this amount as it would any other guideline factor. In some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts.

While the definition of tax loss corresponds to the "criminal deficiency," its amount is to be determined by the same rules applicable in determining any other sentencing factor. In accordance with the "relevant conduct" approach adopted by the guidelines, tax losses resulting from more than one year are to be added regardless of whether the defendant is convicted of multiple counts.

By reference to § 2T1.3, the guideline adopts as an alternative minimum standard a tax loss based on a percentage of the dollar amounts of certain misstatements made in returns filed by the taxpayer. The purpose of this alternative standard is to limit disputes, especially those regarding whether the taxpayer was entitled to offset adjustments that he failed to claim.

The overlapping imprisonment ranges in the Tax Table should also result in minimizing the significance of disputes. The consequence of an inexact estimate of the tax loss is never severe, even when the tax loss is near the boundary of a range. For example, although the difference between \$39,999 and \$40,001 results in a change from level 10 to level 11, any sentence of eight to twelve months would be within the guidelines regardless of the offense level determination made by the court. Indeed, any sentence between ten and twelve months would be within the guidelines for a tax loss ranging from \$20,000 to \$150,000. As a consequence, for all dollar amounts, the Tax Table affords the court considerable latitude in evaluating other factors, even when the amount of the tax loss is uncertain.

Roughly half of all tax evaders are now sentenced to probation without imprisonment, while the other half receives sentences that require them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax evasion and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced. The Commission believes that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax evasion are inconsequential in relation to the potential increase in revenue. Current estimates are that income taxes are underpaid by approximately \$90 billion annually.

Although currently some large-scale evaders serve as much as five years in prison, in practice the average sentence length for defendants sentenced to a term of imprisonment does not increase rapidly with the amount of tax evaded. Thus, the average time served by those sentenced to a term of imprisonment for evading less than \$10,000 in taxes is about nine months, while the corresponding figure for those evading over

\$100,000 in taxes is about sixteen months. Guideline sentences should result in small increases in the average length of imprisonment for most tax cases that involve less than \$100,000 in tax evaded. The increase is expected to be somewhat larger for cases involving more taxes.

Failure to report criminally-derived income is included as a factor for deterrence purposes. This factor is intended to apply to all racketeering activities as defined in 18 U.S.C. 1961. Criminally-derived income is generally difficult to establish, so that the tax loss in such cases will tend to be substantially understated. An enhancement for offenders who violate the tax laws as part of a pattern of criminal activity from which they derive a substantial portion of their income also serves to implement the mandate of 28 U.S.C. 994(n). Current-practice estimates are that, on average, the presence of this factor increases time served by the equivalent of 2 levels.

Although tax evasion always involves some planning, unusually sophisticated efforts to conceal the evasion decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells. Analyses of data for other frauds and property crimes show that careful planning or sophistication generally results in an average increase of at least 2 levels.

The Commission has not made a less severe distinction for an employee who prepares fraudulent returns on behalf of his employer. The adjustments in Chapter Three, Part B (Role in the Offense) should suffice for this purpose.

**§ 2T1.2.** This section applies to violations of 26 U.S.C. 7203. Such violations are usually serious misdemeanors that are similar to tax evasion, except that there need be no affirmative act in support of the offense. They are rarely prosecuted unless the defendant also owed taxes that he failed to pay.

Because the conduct generally is tantamount to tax evasion, the guideline is similar to § 2T1.1. Because the offense is a misdemeanor, the offense level has been set at one below the level corresponding to evasion of the same amount of taxes. The commentary to § 2T1.1 regarding aggravating and mitigating factors also applies to this offense.

An alternative measure of the tax loss, 10 percent of gross income in excess of \$20,000, has been provided because of the difficulty of computing the tax loss, which may become the subject of protracted civil litigation. It is expected that the measure used will generally understate the tax due, and will not call for a sentence approaching the maximum unless very large incomes are involved. Thus, the burden will remain on the prosecution to provide a more accurate estimate of the tax loss if it seeks enhanced punishment.

The intended impact of this guideline is to increase the average time served for this offense, and to increase significantly the number of violators who receive a term of imprisonment. Currently, the average time served for this offense is approximately 2.5

months, including those who are not sentenced to prison. Considering only those who do serve a term of imprisonment, the average term is about six to seven months. (5). § 2T1.4 applies to violations of 26 U.S.C. 7206(2). Together, these guidelines cover a wide variety of conduct that is usually equivalent to actual or attempted tax evasion (subsection 1), or aiding or abetting tax evasion (subsection 2). Accordingly, the guidelines treat the offenses much like tax evasion.

Existence of a tax loss is not an element of these offenses. Furthermore, in instances where the defendant is setting the groundwork for evasion of a tax that is expected to become due in the future, he may make false statements that underreport income, that as of the time of conviction, may not yet have resulted in a tax loss. In order to gauge the seriousness of these offenses, the guidelines establish a rule for determining a "tax loss" based on the nature and magnitude of the false statements made. Use of this approach also avoids complex problems of proof and invasion of privacy when returns of persons other than the defendant and co-defendants are involved.

In certain instances, such as promotion of a tax shelter scheme, the defendant may advise other persons to violate their tax obligations through filing returns that find no support in the tax laws. If this type of conduct can be shown to have resulted in the filing of false returns (regardless of whether the principals were aware of their falsity), the misstatements in all such returns will contribute to one aggregate "tax loss."

The first specific offense characteristic in § 2T1.3 is the same as that in § 2T1.1. The first specific offense characteristic in § 2T1.4, however, applies to persons who derive substantial income through fraudulent tax schemes, rather than through other forms of crime. It serves, for example, to enhance the sentence for promoters of fraudulent tax shelters.

An increased offense level is specified for tax preparers and advisers because their misconduct poses a greater risk of revenue loss and is more clearly willful. Do not also employ § 3B1.3 (Abuse of Position of Trust or Special Skill) if this adjustment applies. If the defendant earns his living through promoting fraudulent tax schemes, § 2T1.4(b)(1) will increase the offense level further.

**§ 2T1.5.** This section applies to conduct proscribed by 26 U.S.C. § 7207, which is a misdemeanor. It is to be distinguished from 26 U.S.C. 7206(1) (§ 2T1.3), which is a felony that requires a false statement under penalty of perjury. The offense level has been set at 6 in order to give the sentencing judge considerable latitude because the conduct may be similar to tax evasion.

**§ 2T1.6.** This section applies to conduct proscribed by 26 U.S.C. § 7202, a felony that is infrequently prosecuted. The failure to collect or truthfully account for the tax must be willful, as must the failure to pay. Where no effort is made to defraud the employee, the offense is a form of tax evasion, and is treated as such in the guidelines. In the event that the employer not only failed to account

to the Internal Revenue Service and pay over the tax, but also collected the tax from employees and did not account to them for it, it is both tax evasion and a form of embezzlement. In such instances, the court may wish to consider whether a sentence above the guideline is warranted.

**§ 2T1.7.** This section applies to conduct proscribed by 26 U.S.C. 7215 and 7512(b). This offense is a misdemeanor that does not require any intent to evade taxes, nor even that taxes have not been paid. The more serious offense is 26 U.S.C. 7202 (see § 2T1.6).

This offense should be relatively easy to detect and fines may be feasible. Accordingly, it has been graded considerably lower than tax evasion, although some effort has been made to tie the offense level to the level of taxes that were not deposited. The tax loss is the amount of tax that was not deposited. If funds are deposited and withdrawn without being paid to the Internal Revenue Service, they should be treated as never having been deposited. Basing the fine on the total amount of funds not deposited is suggested.

**§ 2T1.8.** This section applies to violations of 26 U.S.C. 7204 and 7205, misdemeanors that rarely result in substantial terms of imprisonment. If the defendant was attempting to evade, rather than merely delay, payment of taxes, a sentence above the guidelines may be warranted.

**§ 2T1.9.** This section applies to conspiracies to "defraud the United States by impeding, impairing, obstructing and defeating . . . the collection of revenue." *United States v. Carruth*, 699 F.2d 1017, 1021 (9th Cir. 1983), cert. denied, 104 S. Ct. 698 (1984). See also *United States v. Browning*, 723 F.2d 1544 (11th Cir. 1984); *United States v. Klein*, 247 F.2d 908, 915 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958). It does not apply to taxpayers, such as a husband and wife, who merely evade taxes jointly or file a fraudulent return.

This type of conspiracy generally involves substantial sums of income. It also typically is complex and may be far-reaching, making it quite difficult to evaluate the extent of the revenue loss caused. Accordingly, a minimum base offense level of 10 has been specified. If, given the nature of the underlying conduct, a larger resulting tax loss can be established using either the definition in § 2T1.1, or § 2T1.3 such loss would determine the base offense level.

The specific offense characteristics are in addition to those specified in § 2T1.1 and § 2T1.3. These are included because of the potential for such conspiracies to subvert the revenue system, and the danger to law enforcement agents and the public that some of these conspiracies involve. Since the offense is a conspiracy, adjustments from Chapter Three, Part B (Role in the Offense) usually will apply.

## 2. Offenses Involving Alcohol and Tobacco Taxes

This section deals with offenses contained in Parts I-IV of Subchapter J of Title 26, chiefly 26 U.S.C. 5601-5605, 5607, 5608, 5661, 5671, 5697, and 5762, where the essence of the conduct is tax evasion or a regulatory

violation. Because these offenses are no longer a major enforcement priority, no effort has been made to provide a section-by-section set of guidelines. Rather, the conduct is dealt with by dividing offenses into two broad categories: tax evasion offenses and regulatory offenses.

§ 2T2.1. The most frequently prosecuted conduct violating this section is operating an illegal still. 26 U.S.C. 5601(a)(1). Offenses in this subsection are treated as equivalent to income tax evasion offenses. The tax loss is the total amount of unpaid taxes that were due on the alcohol and/or tobacco.

Offense conduct directed at more than tax evasion (e.g., theft or fraud) may warrant departure above the guideline.

§ 2T2.2. For offenses where there is no effort to evade taxes, such as recordkeeping violations, the offense level is set at 5. Prosecution of these offenses is rare.

### 3. Offenses Involving Customs

This part deals with violations of 18 U.S.C. 496, 541-545, 547, 548, 550, 551, 1915 and 19 U.S.C. 283, 1436, 1464, 1465, 1568(e), 1708(b). These guidelines are primarily aimed at revenue collection or trade regulation. They are not intended to deal with the importation of contraband, such as drugs, or other items such as obscene material, firearms or pelts of endangered species, the importation of which is prohibited or restricted for non-economic reasons. Other, more specific legislation generally applies to most of these offenses. Importation of contraband or stolen goods would be a reason for referring to another, more specific guideline, or for imposing a sentence above that specified in these guidelines.

§ 2T3.1. This offense is treated as equivalent to tax evasion. A lower offense level, or a point near the minimum of the range, might be appropriate for cases involving tourists who bring in items for their own use. Such conduct generally poses a lesser threat to revenue collection.

Particular attention should be given to those items for which entry is prohibited, limited, or restricted. Especially when such items are harmful or protective quotas are in effect, the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, the court should impose a sentence above the guideline. A sentence based upon an alternative measure of the "duty" evaded, such as the increase in market value due to importation, or 25 percent of the items' fair market value in the United States, might be considered.

§ 2T3.2. This offense, encompassed by 18 U.S.C. 545, is treated as equivalent to smuggling without payment of any duty.

### Part X—Other Offenses

#### 1. Conspiracies, Attempts, Solicitations

18 U.S.C. 286

18 U.S.C. 371-373

18 U.S.C. 2271

#### § 2X1.1. Attempt, Solicitation, or Conspiracy Not Covered by a Specific Guideline

(a) Base Offense Level: The base offense level from the guideline for the object offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty.

(b) Specific Offense Characteristics.

(1) If an attempt or solicitation, decrease by 3 levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control.

(2) If a conspiracy, decrease by 3 levels, unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control.

(3) If a solicitation, and the statute treats solicitation identically with the object of the offense, do not apply § 2X1.1(b)(1), if the offense level for solicitation is the same as that for the object offense.

#### COMMENTARY

§ 2X1.1 (18 U.S.C. 286, 371-372, 2271). Many types of attempts or conspiracies are covered by specific guidelines, e.g., § 2A2.1 (Attempt or Conspiracy to Commit Murder); § 2A3.1 (Attempted Criminal Sexual Abuse). This section applies only in the absence of a more specific guideline.

Under the principle adopted in this section, in many cases the offense level will be the same as that for the substantive offense which the defendant conspired or attempted to commit. However, speculative specific offense characteristics will not be applied. Specific offense characteristics apply only to the conduct that the government demonstrates was specifically intended or actually occurred. For example, if two defendants are arrested during the conspiratorial stage of planning an armed bank robbery, the offense level ordinarily would not include speculative aggravating factors such as possible injury to others, hostage taking, discharge of a weapon, or obtaining a large sum of money. The offense level would simply reflect the level applicable to robbery of a financial institution with a weapon. On the other hand in an attempt, if it could be established that the defendants actually intended to physically restrain the tellers, that factor would be considered. In an attempted theft, the value of the items that the defendant intended to steal would be considered.

In most prosecutions for conspiracies or attempts, the object offense was substantially

completed, or the offense was interrupted or prevented on the verge of completion by the intercession of law enforcement authorities or the victim. In such cases, no reduction of the offense level is warranted. Sometimes, however, the arrest occurs well before the defendant or any co-conspirator has completed the necessary acts of the substantive offense. Because it appears likely that a defendant would commit the substantive offense if not apprehended, a substantial sentence is warranted, but punishment should take account of the dangerousness and culpability of the conduct that has actually occurred, not solely the conduct which is predicted. Under such circumstances, a reduction of 3 levels is appropriate.

If the object offense is not covered by a specific guideline, see § 2X5.1 (Other Offenses).

If the defendant was convicted of conspiracy or solicitation and also for the completed offense, the sentence for the conspiracy or solicitation shall be imposed to run concurrently with the sentence for the object offense, except in cases where it is otherwise specifically provided for by the guidelines or by law. 28 U.S.C. 994(1)(2).

### 2. Aiding and Abetting

#### § 2X2.1. Aiding and Abetting

The offense level is the same level as that for the underlying offense.

#### COMMENTARY

§ 2X2.1 (18 U.S.C. 2, 752-753, 755-757, 2383). A defendant convicted of aiding and abetting is punishable as a principal. 18 U.S.C. § 2. This section provides that aiding and abetting the commission of an offense has the same offense level as that for the underlying offense, i.e., the offense that the defendant aided or abetted. Adjustments for role in the offense may apply, however. See Chapter Three, Part B.

### 3. Accessory After the Fact

#### § 2X3.1. Accessory After the Fact

(a) Base Offense Level: 6 levels lower than the offense level for the underlying offense, but in no event less than 5, or more than 30.

#### COMMENTARY

§ 2X3.1 (18 U.S.C. 3, 757, 1071-1072, 1381, 2388(c)). An accessory after the fact may receive up to one-half the punishment prescribed for the principal offender, or if the principal is punishable by death, not more than ten years. 18 U.S.C. 3. The underlying offense is the offense as to which the defendant was an accessory.

### 4. Misprision of Felony

#### § 2X4.1. Misprision of Felony

(a) Base Offense Level: 9 levels lower than the offense level for the underlying offense, but in no event less than 4, or more than 19.

**COMMENTARY**

§ 2X4.1 (18 U.S.C. 4). The maximum penalty for misprision of felony (18 U.S.C. 4) is three years' imprisonment. The underlying offense is the offense as to which the misprision was committed.

**5. All Other Offenses****§ 2X5.1. Other Offenses (Policy Statement)**

If the offense was one for which no specific guideline is written, apply the most analogous guideline.

**COMMENTARY**

§ 2X5.1 (18 U.S.C. 3553(a)(2)). This section addresses cases in which a defendant has been convicted of an offense for which there is no specific guideline. If no sufficiently analogous guideline exists, the court may impose any sentence that is reasonable and consistent with the purposes of sentencing. 18 U.S.C. 3553(a)(2).

**CHAPTER THREE—ADJUSTMENTS****Part A—Victim-Related Adjustments****1. Victim-Related Adjustments**

The following adjustments are included in this Part because they may apply to a wide variety of offenses. They are to be treated as specific offense characteristics. Do not apply these adjustments if the offense guideline incorporates these factors either in the base offense level or as a specific offense characteristic.

**§ 3A1.1. Vulnerable Victim**

If the defendant selected or targeted the victim of the offense because of the victim's unusual vulnerability due to age, physical or mental condition, or because the victim was particularly susceptible to the criminal conduct, increase by 2 levels.

**COMMENTARY**

This adjustment applies to all offenses where the victim's vulnerability played any substantial part in the defendant's decision to commit the offense. The adjustment would apply, for example, in a fraud case where the defendant marketed an ineffective cancer cure, but not in a case where the defendant sold fraudulent securities to the general public and one of the purchasers happened to be senile. Similarly, it would apply in a robbery case where the defendant selected a handicapped victim, but not in an assault case where an elderly wife assaulted her husband.

**§ 3A1.2. Official Victim**

If the victim was any law-enforcement or corrections officer, any other official as defined in 18 U.S.C. 1114, or a member of the immediate family thereof, and the crime was motivated by such status, increase by 3 levels.

**COMMENTARY**

This adjustment applies to all offenses where the defendant knew that the victim was in the performance of the victim's official duties, or the offense was committed because of the official status.

**§ 3A1.3. Restraint of Victim**

If the victim of a crime was physically restrained in the course of the offense, increase by 2 levels.

**COMMENTARY**

This adjustment applies to offenses in Chapter Two, Part A (Offenses Against the Person) and Part H (Offenses Involving Individual Rights) where the victim was physically restrained, as by being tied, bound or locked up.

**Part B—Role in the Offense**

Sections 3B1.1 and 3B1.2 address relative responsibility in cases involving more than one participant. Section 3B1.3 applies regardless of the number of participants.

**§ 3B1.1. Aggravating Role**

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

**§ 3B1.2. Mitigating Role**

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

**§ 3B1.3. Abuse of Position of Trust or Use of Special Skill**

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed in addition to that provided for in § 3B1.1, nor may it be employed if

an abuse of trust or skill is included in the base offense level or specific offense characteristic.

**§ 3B1.4. In Any Other Case, No Adjustment Is Made For Role in the Offense****COMMENTARY**

In offenses involving more than one participant, the number of persons involved is often suggestive of a criminal organization or structure within which the defendant's role or relative responsibility can be defined in fact and for purposes of sentencing. The size of the organization or activity may also be indicative of the degree of success the participants may enjoy and the potential duration or permanency (and long-term effects) of the scheme. Where the offense involves more than one participant, the sentencing judge shall select the most appropriate category in §§ 3B1.1–3B1.2, or § 3B1.4, to reflect the defendant's role in the offense and relative culpability. In selecting the appropriate category, all persons involved during the course of the entire offense shall be included in determining the size of the association or conspiracy.

Section 3B1.1 distinguishes relative responsibility for purposes of sentencing. The extent of the activity is suggestive of the scope of the undertaking, its harms or its effects. A fraud or scheme that only involves three participants but involves the unknowing services of many outsiders could be considered extensive. In distinguishing leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision-making authority, the degree of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the planning or organization of the offense, the scope of the illegal activity, the nature and seriousness of the criminal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy.

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of § 3B1.1(c).

Section 3B1.2(a) applies to a defendant who plays a minimal role in concerted activity. It is intended to apply to defendants who are plainly among the least culpable of those involved in the conduct of a group of individuals. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant. It is intended that the downward adjustment for a minimal participant will be used

infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marijuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.

For purposes of § 3B1.2(b), a minor participant means any participant who is less culpable than most others in the scheme but who has more than a minimal role.

The adjustment in § 3B1.3 applies to persons who abuse their positions of trust, or their special skills, to significantly facilitate the commission or concealment of a crime. The position of trust must have contributed in some substantial way, and not merely have provided an opportunity that could have as easily been afforded to other persons.

"Special skill" refers to a skill not possessed by members of the general public, and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists and demolition experts.

### Part C—Obstruction

#### § 3C1.1. Willfully Obstructing or Impeding Proceedings

If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level from Chapter Two by 2 levels.

### COMMENTARY

This section provides a sentence enhancement for a defendant who engages in conduct calculated to mislead or deceive authorities or those involved in a judicial proceeding, or to otherwise willfully interfere with the disposition of criminal charges. The following conduct, while not exclusive, may provide a basis for applying this adjustment:

- (1) Destroying or concealing material evidence, or attempting to do so;
- (2) Directing or procuring another person to destroy or conceal material evidence, or attempting to do so;
- (3) Testifying untruthfully or suborning untruthful testimony concerning a material fact, or producing or attempting to produce an altered, forged, or counterfeit document or record during a preliminary or grand jury proceeding, trial, a sentencing proceeding, or any other judicial proceeding;
- (4) Threatening, intimidating, or otherwise unlawfully attempting to influence a codefendant, witness or juror, directly or indirectly;
- (5) Furnishing material falsehoods to a probation officer in the course of a presentence or other investigation for the court.

In applying this provision, a sentencing judge should evaluate suspect testimony and statements in a light most favorable to the defendant.

This provision is not intended to punish a defendant for the exercise of a Constitutional right. A defendant's denial of guilt is not a basis for application of this provision.

Sentences imposed after an independent prosecution for perjury or obstruction of justice are governed by Chapter Two, Part J (Offenses Involving the Administration of Justice).

### Part D—Multiple Counts

**Introduction.** This section provides rules for determining the combined offense level when the defendant is convicted of multiple counts. Implementation of the resulting sentence is dealt with in Chapter Five, Determining the Sentence.

The provisions of this section are necessarily detailed. In essence, they call for a three-step procedure. First, the court will group the various counts of conviction into Count Groups, each group consisting of counts representing closely-related conduct. Second, the court will determine the guideline offense level applicable to each Count Group. Third, the court will identify the Count Group carrying the highest offense level and determine the extent to which that offense level must be increased to produce the combined offense level.

The basic idea underlying this section is to add up commensurable items, such as money and drugs, contained in separate counts, and treat the result as if it were a conviction on a single count for the total amount and total offense behavior. In situations where a person is convicted of several independent offenses embodied in several different counts, the punishment will be aggravated for each additional offense, but on a diminishing scale. Where the other offenses are closely interrelated, they are grouped together and treated as a single count. The reason the section is complicated is that there must be rules for determining whether separate counts really do in fact embody distinct offenses that should result in added punishment.

#### § 3D1.1. Procedure for Determination of Offense Level on Multiple Counts

When a defendant has been convicted of more than one count, the court shall:

- (a) Group the counts resulting in conviction into distinct Count Groups by applying the rules specified in § 3D1.2.
- (b) Determine the offense level applicable to each Count Group by applying the rules specified in § 3D1.3.
- (c) Determine the combined offense level applicable to all Count Groups taken together by applying the rules specified in § 3D1.4.

#### § 3D1.2. Count Groups

All counts involving substantially the same harm shall be grouped together into a single Count Group. A count for

which the statute mandates imposition of a consecutive sentence is excluded from such groups for purposes of §§ 3D1.2–3D1.5. Counts involve the same harm within the meaning of this rule:

- (a) When counts involve the same victim and the same act or transaction.
- (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan, including, but not limited to:

(1) A count charging conspiracy or solicitation and a count charging any substantive offense that was the sole object of the conspiracy or solicitation. 28 U.S.C. 994(1)(2).

(2) A count charging an attempt to commit an offense and a count charging the commission of the offense. 18 U.S.C. 3584(a).

(3) A count charging an offense based on a general prohibition and a count charging violation of a specific prohibition encompassed in the general prohibition. 28 U.S.C. 994(u).

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in or other adjustment to the guideline applicable to another of the counts.

(d) When counts involve the same general type of offense and the guidelines for that type of offense determine the offense level primarily on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm. Offenses of this kind are found in Chapter Two, Part B (except §§ 2B2.1–2B3.3), Part D (except §§ 2D1.6 2D3.4), Part E (except §§ 2E1.1 2E2.1), Part F, Part G (§§ 2G2.2–2G3.1), Part K (§ 2K3.3), Part L (§ 2L1.3), Part N (§§ 2N2.1, 2N3.1), Part Q (§§ 2Q2.1, 2Q2.2), Part R, Part S, and Part T. This rule also applies where the guidelines deal with offenses that are continuing, e.g., § 2Q1.3(b)(1)(A).

#### § 3D1.3. Offense Level Applicable to Each Count Group

Determine the offense level applicable to the Count Groups as follows:

- (a) In the case of counts grouped together pursuant to § 3D1.2(a)–(c), the offense level applicable to a Count Group is the offense level, determined in accordance with all provisions of Chapters Two and Three, for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group.
- (b) In the case of counts grouped together pursuant to § 3D1.2(d), the offense level applicable to a Count

Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapters Two and Parts A, B and C of Chapter Three. When different counts involve varying offenses, apply the offense guideline that produces the highest offense level.

(c) The "most serious" Count Group is that with the highest offense level.

#### § 3D1.4. Combined Offense Level

The combined offense level is determined by taking the offense level applicable to the most serious Count Group and increasing that offense level by the amount indicated in the following table:

Number of units	Increase in offense level
1 .....	None.
1 1/2 .....	Add 1 level.
2 .....	Add 2 levels.
3 .....	Add 3 levels.
4 or 5 .....	Add 4 levels.
More than 5 .....	Add 5 levels.

In determining the number of Units for purposes of this section:

(a) Count as one Unit the most serious Count Group. Also count one Unit for each Count Group that is equally serious or 1 to 4 levels less serious.

(b) Count as one-half Unit any Count Group that is 5 to 8 levels less serious than the most serious Count Group.

(c) Disregard any Count Group that is 9 or more levels less serious than the most serious Count Group. Such Count Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

(d) Except when the total number of Units is 1 1/2, round up to the next largest whole number.

#### § 3D1.5. Total Punishment

The total punishment to be imposed is the punishment that the court determines to be appropriate for the defendant's criminal history category and the combined offense level, in accordance with the rules specified in Chapter Five.

#### COMMENTARY

§ 3D1.1. This section summarizes the procedure to be used for determining a combined offense level for use in determining and implementing the sentence pursuant to Chapter Five.

§ 3D2.2. The first step in determining the appropriate punishment in a case involving multiple counts is to combine counts that involve the same harm, or harms that are closely related because they arise out of the same transaction or a common scheme. This section specifies, however, that when the defendant has been convicted on a count for which the statute mandates imposition of a

consecutive sentence, such as 18 U.S.C. § 924(c) (use of firearm in commission of a crime of violence), that count is excluded from the punishment calculations under §§ 3D1.2-3D1.4. Note that for convictions under 18 U.S.C. § 924(c), the offense level for other counts will be affected, however, because the specific offense characteristics for weapon use are ignored. See Commentary to § 2K2.4.

To group counts as required by this section, the court must determine whether the counts involve the same victim and the same or closely related transactions. For example, if a defendant, in the course of a single attack, inflicted two stab wounds on one victim, and if each wound were the subject of a separate assault count, the two counts would be grouped together because they involve harm inflicted on the same victim in the same transaction. In the abstract, infliction of two wounds is more serious than infliction of one, but the number of blows is less significant than the overall seriousness of the injuries, which will determine the offense level regardless of the manner in which counts are formally drafted.

The Commission also concluded that the same principle should apply even when different kinds of harm are inflicted on the victim, provided that such harms arise out of the same or closely related transactions. For example, a defendant who commits a forcible sexual offense, inflicts stab wounds, and then takes the victim's purse may be convicted in separate counts of rape, aggravated assault and robbery. Under § 3D1.2(b), the three counts would be grouped together and their seriousness (determined under § 3D1.3) would be determined by the offense level applicable to the most serious of the counts (rape), as adjusted to reflect the circumstances of its occurrence. Although rape accompanied by robbery is somewhat more serious than rape alone, it is in no way comparable, in danger or in victim suffering, to a rape followed two days later by robbery of the same or a different victim. The Commission concluded that guidelines treating counts as distinct whenever they involved any distinguishable harms would be unacceptable because doing so would overcount and would not capture the essential distinction between contemporaneous harms to the same victim and harms to separate victims in distinct transactions. The offense guideline for rape includes the most common aggravating factors, including injury; the additional factor of property loss from the robbery ordinarily can be considered adequately within the guideline range, which is fairly wide.

A related issue concerns the treatment of the defendant who harms several victims in the course of a single transaction. A defendant may shoot three F.B.I. agents in a single gun fight. Some would argue that all counts arising out of a single transaction or occurrence should be grouped together even when there are distinct victims. However, the Commission concluded that cases involving injury to distinct victims are roughly comparable, whether or not the injuries are inflicted in distinct transactions, and each such count should be treated separately. In general, counts are grouped together only

when they involve both the same victim and the same or closely related transactions, except as provided in § 3D1.2(d).

Section 3D1.2(c) provides that when a factor that represents a separate count, e.g., weapon possession or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that factor is to be grouped with the count as to which it constitutes an aggravating factor. Note that sometimes there may be several counts, each of which could be treated as an aggravating factor to another, more serious count, but the more serious count allows an adjustment only for one occurrence of that factor. In such cases, only the count representing the most serious of those factors is to be grouped with the other count. For example, if in a bank robbery on a federal enclave two tellers are assaulted and one of them is injured seriously, the assault with serious bodily injury would be grouped with the robbery count, while the remaining assault would be treated separately.

Section 3D1.2(d) requires grouping of offenses for which the guidelines use some measure of aggregate harm as the primary criterion for determining the offense level. When a teller embezzles funds from a bank, the seriousness of the offense depends primarily on the total amount taken; punishment should not be influenced significantly by whether one or several distinct acts are charged. Similarly, in a mail fraud case, the seriousness of the offense depends on the scope and sophistication of the fraud, not on the number of mailings.

Note that a Count Group often will include only one count.

§ 3D1.3. This section provides rules for determining the offense level associated with each set of counts grouped together as a single Count Group. When applying § 3D1.3(c), note that guidelines for similar offenses have been coordinated to produce identical offense levels, at least when large sums are involved.

§ 3D1.4. This section provides a rule for calculating the combined offense level applicable to all counts taken together. The court should first identify the offense level applicable to the most serious Count Group and then increase that offense level by the number of offense levels indicated in the table. However, when the most serious Count Group carries an offense level substantially higher than that applicable to the other Count Groups, counting those Groups fully for purposes of the table could add more punishment than such offenses would carry if prosecuted separately. To avoid this anomalous result the Commission determined that Count Groups 9 or more levels less serious than the most serious Count Group should not be counted for purposes of the table and that Groups 5 to 8 levels less serious should be treated as equal to one-half of a Group. Thus, if the most serious Count Group is at offense level 15 and if two other Count Groups are at level 10, there would be a total of two Units for purposes of the table (one plus one-half plus one-half) and the combined offense level would be 17. When this approach produces a fraction in the total

Units, other than  $1\frac{1}{2}$ , it is rounded up to the nearest whole number.

An alternative method for ensuring that offense level increases reflect the potentially much lower seriousness of other Count Groups would be to determine the appropriate offense level adjustment through a more complex mathematical formula. The Commission concluded that any gain in precision achieved by such an approach would be more than offset by its complexity. Since the problem arises only when the most serious offense is much more serious than all of the others, the judge ordinarily will have room to impose added punishment by sentencing toward the upper end of the range authorized for the most serious offense. Situations in which this approach will leave inadequate scope for ensuring some additional punishment for the additional crimes are likely to be unusual and can be handled, if they arise, by departure from the guidelines.

Another problem can arise when all Count Groups carry very low offense levels, as for example when the defendant trespasses on two distinct pieces of property in the course of a single transaction. The first trespass count would carry an offense level of 4 and the second count would increase the offense level to 6, raising the maximum authorized term of imprisonment by 50%. Again, this problem could be avoided by relying on precise mathematical formulae, but the Commission concluded that such an approach was unnecessary since the authorized ranges at the lower offense levels are broad enough to permit courts to avoid any excessive punishment increases for counts of minor significance. Once again situations in which this approach will be inadequate to avoid injustice are likely to be rare and can be handled by departure from the guidelines.

**§ 3D1.5.** This section refers the court to Chapter Five in order to determine the total punishment to be imposed based upon the combined offense level.

**Illustrations.** The following examples, drawn from presentence reports in the Commission's files, illustrate the operation of the guidelines on consecutive and concurrent sentences:

1. Defendant A was convicted on four counts each charging robbery of a different bank. Because each count involved a different victim, each would represent a distinct Count Group. **§ 3D1.2.** In each of the first three robberies, the offense level was 19 (18 plus a 1-level increase because a financial institution was robbed) (**§ 2B2.1**). In the fourth robbery \$12,000 was taken and a gun was discharged; the offense level was therefore 25. As the first three counts are 6 levels lower than the fourth, each of the first three represents one-half a unit for purposes of **§ 3D1.4**. Altogether there are  $2\frac{1}{2}$  units (rounded up to 3), and the offense level for the most serious (25) is: therefore increased by 3 levels under the table. The combined offense level is 28.

2. Defendant B, a housing inspector, was convicted on four counts, each charging receipt of a bribe. Counts one and two charged receiving payments of \$3,000 and \$2,000 from Landlord X in return for a single

action with respect to a single property. Count three charged receipt of \$1,500 from Landlord X for taking action with respect to another property, and count four charged receipt of \$1,000 from Landlord Y for taking action with respect to a third property. Counts one and two, arising out of the same transaction, are combined into a single Count Group involving a \$5,000 bribe and hence an offense level of 11 (**§ 2C1.1(a)(1)**, **§ 2F1.1**). Each of the two remaining counts represents a distinct Count Group, at offense level 10. As there are altogether three Count Units, the offense level for the most serious (11) is increased by 3 levels. The combined offense level is 14.

3. Defendant C was convicted on the following seven counts: (1) theft of a \$2,000 check; (2) uttering the same \$2,000 check; (3) possession of a stolen \$1,200 check; (4) forgery of a \$600 check; (5) possession of a stolen \$1,000 check; (6) forgery of the same \$1,000 check; (7) uttering the same \$1,000 check.

Counts 1, 3 and 5 involve offenses under Part B (Theft), while Counts 2, 4, 6 and 7 involve offenses under part F (Fraud and Deceit). For purposes of **§ 2D1.2(c)**, fraud and theft are treated as offenses of the same kind, and therefore all counts are grouped into a single Count Group, for which the offense level depends on the aggregate harm. The total value of the checks is \$4,800. The fraud guideline is applied, because it produces results that are at least as large as the theft guideline. The base offense level is 6, and there is an aggravator of 1 level for property value. However, because the conduct involved repeated acts, the offense level is raised to 10 (**§ 2F1.1(b)(1)(B)**). The combined offense level therefore is 10.

4. Defendant D was convicted on four counts: (1) distribution of 230 grams of cocaine; (2) distribution of 150 grams of cocaine; (3) distribution of seventy-five grams of heroin; (4) offering a DEA agent \$20,000 to avoid prosecution. The combined offense level for drug offenses is determined by the total quantity of drugs, converted to heroin equivalents. Count 1 translates into forty-six grams of heroin; Count 2 translates into thirty grams of heroin. The total is 151 grams of heroin. Under **§ 2D1.1**, the combined offense level for the drug offenses is 26. In addition, because of the attempted bribe of the DEA agent, this offense level is increased by 2 levels to 28 under **§ 3C1.1 (Obstruction)**. Because the bribery is accounted for by **§ 3C1.1**, it becomes part of the drug Count Group and would not otherwise increase the offense level of the drug Count Group. **§ 3D1.2(c)**.

5. Defendant E was convicted of four counts arising out of a scheme pursuant to which he received kickbacks from subcontractors. The counts were as follows: (1) The defendant received \$27,000 from subcontractor A relating to contract X (Mail Fraud). (2) The defendant received \$12,000 from subcontractor A relating to contract X (Commercial Bribery). (3) The defendant received \$15,000 from subcontractor A relating to contract Y (Mail Fraud). (4) The defendant received \$20,000 from subcontractor B relating to contract Z (Commercial Bribery). The mail fraud counts

are covered by **§ 2F1.1 (Fraud and Deceit)**. The bribery counts are covered by **§ 2B4.1 (Commercial Bribery)**, which treats the offense as a sophisticated fraud. The total money involved is \$74,000, which results in an offense level of 13 under either **§ 2B4.1** or **§ 2F1.1**. Consequently, the combined offense level is 13.

## Part E—Acceptance of Responsibility

### § 3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense of conviction, reduce the offense level by 2 levels.

(b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial.

(c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

### COMMENTARY

The reduction of sentence available under **§ 3E2.1** recognizes a number of societal interests. The defendant who affirmatively accepts personal responsibility for the offense, who takes affirmative steps to dissociate himself from criminal conduct, and who attempts to rectify the harm caused by the conduct may be entitled to receive recognition for these socially desirable actions. In determining whether the defendant qualifies for this provision, the timeliness of the defendant's conduct in manifesting an acceptance of responsibility for the offense is particularly important. Other appropriate considerations include, but are not limited to, the following:

- (1) Voluntary termination or withdrawal from criminal activity or associations;
- (2) Voluntary payment of restitution to a victim prior to adjudication of guilt;
- (3) Voluntary and truthful admission to authorities of involvement in the offense and related conduct;
- (4) Voluntary surrender to authorities before charges are filed or an arrest warrant is executed;
- (5) Voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
- (6) Voluntary resignation from the office or position held during the commission of the offense.

The sentencing judge is in a unique position to evaluate the defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review and should not be disturbed unless without foundation.

Subdivisions (b) and (c) provide that the availability of a reduction under **§ 3E2.1** is not governed by the plea entered. A defendant may manifest sincere contrition and take steps toward reparation and

rehabilitation even if he exercises his constitutional right to a trial. This may occur when a defendant decides to go to trial to assert and preserve issues that do not relate to factual guilt, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct, or to raise evidentiary issues that may result in the acquittal. Conversely, a defendant who perjures himself, suborns perjury or otherwise obstructs the trial or the administration of justice, cf. § 3E1.1, is not entitled to an adjustment for acceptance of responsibility.

Although a guilty plea may be some evidence of the defendant's acceptance of responsibility, it does not automatically entitle him to a sentencing adjustment.

## CHAPTER FOUR—CRIMINAL HISTORY

### Part A—Criminal History

**Introduction.** The Comprehensive Crime Control Act sets forth four purposes of sentencing. (See 18 U.S.C. 3553(a)(2).) A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.

The specific factors included in § 4A1.1 and § 4A1.3 are consistent with the extant empirical research assessing correlates of recidivism, and patterns of career criminal behavior. While empirical research has shown that other factors are correlated highly with likely recidivism, e.g., age, for policy reasons they were not here included at this time. The Commission has made no definitive judgment in respect to the reliability of the presently existing data. However, the Commission will review further data insofar as it becomes available in the future.

#### § 4A1.1. Criminal History Category

The total points from items (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not included in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b). If 2 points are added for item (d), add only 1 point for this item.

#### § 4A1.2. Definitions and Instructions for Computing Criminal History

##### (a) Prior Sentence Defined:

(1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense.

(2) Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history. Use the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment imposed in the case of consecutive sentences.

(3) A conviction for which the imposition of sentence was totally suspended or stayed shall be counted as a prior sentence under § 4A1.1(c).

##### (b) Sentence of Imprisonment Defined:

(1) The term "sentence of imprisonment" means a sentence of incarceration and refers to the maximum sentence imposed.

(2) If part of a sentence of imprisonment was suspended, "sentence of imprisonment" refers only to the portion that was not suspended.

##### (c) Sentences Counted and Excluded:

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

(1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:

Contempt of court  
Disorderly conduct or disturbing the peace  
Driving without a license or with a revoked or suspended license  
False information to a police officer  
Fish and game violations  
Gambling

Hindering or failure to obey a police officer

Leaving the scene of an accident

Local ordinance violations

Non-support

Prostitution

Resisting arrest

Trespassing

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

Hitchhiking

Juvenile status offenses and truancy

Loitering

Minor traffic infractions

Public intoxication

Vagrancy

(d) Offenses Committed Prior to Age Eighteen:

(1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under § 4A1.1(a) for each such sentence.

(2) In any other case,

(A) Add 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense;

(B) Add 1 point under § 4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).

(e) Applicable Time Period:

(1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month that resulted in the defendant's incarceration during any part of such fifteen-year period.

(2) Any other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted.

(3) Any prior sentence not within the time periods specified above is not counted.

(f) Diversionary Dispositions:

Diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt in a judicial proceeding is counted as a sentence under § 4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.

(g) Military Sentences:

Sentences resulting from military offenses are counted if imposed by a general or special court martial. Sentences imposed by a summary court martial or Article 15 proceeding are not counted.

(h) Foreign Sentences:

Sentences resulting from foreign convictions are not counted, but may be considered under § 4A2.3 (Adequacy of Criminal History Category).

(i) Tribal Court Sentences:

Sentences resulting from tribal court convictions are not counted, but may be considered under § 4A1.3 (Adequacy of Criminal History Category).

(j) Expunged Convictions:

Sentences for expunged convictions are not counted, but may be considered under § 4A1.3 (Adequacy of Criminal History Category).

(k) Revocations of Probation, Parole, Mandatory Release, or Supervised Release:

(1) In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for § 4A1.1(a), (b), or (c), as applicable.

(2) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the points for § 4A1.1(e) in respect to the recency of last release from confinement. It may also affect the time period under which certain sentences are counted as provided in § 4A1.2(e)(1).

COMMENTARY

Sections 4A1.1 and 4A1.2 provide instructions for calculation of criminal history. The total criminal history points determine a defendant's criminal history category for the Sentencing Table in Chapter Five.

**Criminal History Points.** Three points are added for each sentence counted under § 4A1.1(a). There is no limit to the number of points countable under this item. Two points are added for each sentence counted under § 4A1.1(b). There is no limit to the number of points countable under this item. One point is added for each sentence counted under § 4A1.1(c), up to a maximum of four points for this item. If the defendant was under any form of criminal justice control at the time of the instant offense as specified in § 4A1.1(d), two points are added. If the defendant committed the instant offense less than two years after release from imprisonment, as specified in § 4A1.1(e), two points are added, except that the total number of points for both (d) and (e) is limited to three.

**Prior Sentences.** Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and

manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. Imposition of a sentence exceeding a year and one month of imprisonment generally reflects a judicial assessment that the underlying criminal conduct was serious. In recognition of the imperfection of this measure however, § 4A1.3 permits information about the significance or similarity of past conduct underlying prior convictions to be used as a basis for imposing a sentence outside the applicable guideline range.

Subdivisions (a), (b), and (c) of § 4A1.1 distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, probation, fines, and residency in a halfway house. To be considered a confinement sentence, time must have been served (or, if the defendant escaped, would have been served). For purposes of applying § 4A1.1 (a), (b), or (c), a sentence of imprisonment is the stated maximum. That is, criminal history points are based on the sentence pronounced, not the time actually served. A sentence of probation is to be treated as a sentence under § 4A1.1(c) unless a condition of probation requiring imprisonment of at least sixty days was imposed.

Section 4A1.1(d) implements one measure of recency by adding two points if the defendant was under criminal justice control during the commission of the instant offense.

Section 4A1.1(e) implements another measure of recency by adding two points if the defendant committed any part of the instant offense less than two years immediately following his release from confinement on a sentence counted under § 4A1.1(a) or (b). This also applies if the defendant committed the instant offense while still in confinement on such a sentence. Because of the potential overlap of (d) and (e), their combined impact is limited to three points. However, a defendant who falls within both (d) and (e) is more likely to commit additional crimes; thus, (d) and (e) are not completely combined.

**Sentences Imposed in the Alternative.**

Sentences which specify a fine as an alternative to a term of imprisonment (e.g., \$1,000 fine or ninety days' imprisonment) should be treated as a sentence under § 4A1.1(c).

**Related Cases.** Cases are considered related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing. The court should be aware that there may be instances in which this definition is overly broad and will result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that he presents to the public. For example, if the defendant commits a number of offenses on independent occasions separated by arrests, and the resulting criminal cases are

consolidated and result in a combined sentence of eight years, counting merely three points for this factor will not adequately reflect either the seriousness of the defendant's criminal history or the frequency with which he commits crimes. In such circumstances, the court should consider whether departure is warranted. See § 4A1.3.

**Invalid Convictions.** Sentences resulting from convictions that have been reversed or vacated because of errors of law, or because of subsequently-discovered evidence exonerating the defendant, are not to be counted. Any other sentence resulting in a valid conviction is to be counted in the criminal history score. Convictions which the defendant shows to have been constitutionally invalid may not be counted in the criminal history score. Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score. Nonetheless, any conviction that is not counted in the criminal history score may be considered pursuant to § 4A1.3 if it provides reliable evidence of past criminal activity.

**Convictions Set Aside or Defendant Pardoned.** A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. § 4A1.2(j).

**Offenses Committed Prior to Age Eighteen.** Section 4A1.2 (d) covers offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant's commencement of the instant offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a "juvenile," this provision applies to all offenses committed prior to age eighteen.

**Applicable Time Period.** Section 4A1.2(e) establishes the time period within which prior sentences are counted. If the government is able to show that a sentence imposed outside this time period is evidence of similar misconduct or the defendant's receipt of a substantial portion of income from criminal livelihood, the court may consider this information in determining whether to depart and sentence above the applicable guideline range.

**Diversionsary Dispositions.** Section 4A1.2(f) requires counting prior adult diversionsary dispositions if they involved a judicial determination of guilt or an admission in open court of guilt. This reflects a policy that

defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.

Revocations to be Considered. Section 4A1.2(j) covers revocations of probation and other conditional sentences where the original term of imprisonment imposed, if any, did not exceed one year and one month. Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked. If the sentence originally imposed, the sentence imposed upon revocation, or the total of both sentences exceeded one year and one month, the maximum three points would be assigned. If, however, at the time of revocation another sentence was imposed for a new criminal conviction, that conviction would be computed separately from the sentence imposed for the revocation.

#### § 4A1.3. Adequacy of Criminal History Category (Policy Statement)

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:

(a) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses);

(b) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;

(c) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;

(d) Whether the defendant was pending trial, sentencing, or appeal on another charge at the time of the instant offense;

(e) Prior similar adult criminal conduct not resulting in a criminal conviction.

A departure under this provision generally will occur when the criminal history category significantly underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes. Examples might include the case of a defendant who (1) had several previous foreign sentences for serious offenses, (2) had received a prior consolidated sentence of ten years

for a series of serious assaults, (3) had a similar instance of large scale fraudulent misconduct established by an adjudication in a Security Exchange Commission enforcement proceeding, (4) committed the instant offense while on bail or pretrial release for another serious offense or (5) for appropriate reasons, such as cooperation in the prosecution of other defendants, had previously received an extremely lenient sentence for a serious offense. The court may, after a review of all the relevant information, conclude that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines. However, a prior arrest record itself shall not be considered under § 4A1.3.

There may be cases where the court concludes that a defendant's criminal history category significantly overrepresents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. An example might include the case of a defendant with two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. The court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same criminal history category (Category II), and therefore consider a downward departure from the guidelines.

In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly underrepresents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with a Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category IV criminal history to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for a Category VI criminal is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a decision above the guideline range for a defendant with a Category VI criminal history may be

warranted. However, this provision is not symmetrical. The lower limit of the range for a Category I criminal history is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for a Category I criminal history on the basis of the adequacy of criminal history cannot be appropriate.

#### COMMENTARY

§ 4A1.3. This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.

#### Part B—Career Offenders and Criminal Livelihood

28 U.S.C. 994(h)

28 U.S.C. 994(i)(2)

#### § 4B1.1. Career Offender

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense is a crime of violence or trafficking in a controlled substance, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense statutory maximum	Offense level
(A) Life .....	37
(B) 20 years or more .....	34
(C) 10 years, but less than 20 years .....	26
(D) 5 years, but less than 10 years .....	19

Offense statutory maximum	Of- fense level
(E) 1 year & 1 day, but less than 5 years.....	12
(F) 1 year or less .....	4

#### § 4B1.2. Definitions

(1) The term "crime of violence" as used in this provision is defined under 18 U.S.C. § 16.

(2) The term "controlled substance offense" as used in this provision means an offense identified in 21 U.S.C. 841, 952(a), 955, 955a, 959; 405B and 416 of the Controlled Substance Act as amended in 1986, and similar offenses.

(3) The term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions for either a crime of violence or a controlled substance offense (i.e., two crimes of violence, two controlled substance offenses, or one crime of violence and one controlled substance offense), and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of Part A of this Chapter. The date that a defendant sustained a conviction shall be the date the judgment of conviction was entered.

#### § 4B1.3. Criminal Livelihood

If the defendant committed an offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income, his offense level shall be not less than 13. In no such case will the defendant be eligible for a sentence of probation.

#### COMMENTARY

28 U.S.C. 994(h) mandates that the Commission assure that certain "career" or special offenders, as defined in the statute, receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this mandate. The legislative history of this provision suggests that the phrase "maximum term authorized" should be construed as the maximum term authorized by statute. See S. Rep. 98-225, 98th Cong., 1st Sess. 175 (1983), 128 Cong. Rec. 12792, 97th Cong., 2d Sess. (1982) ("Career Criminals" amendment No. 13 by Senator Kennedy), 12796 (explanation of amendment), and 12798 (remarks by Senator Kennedy).

The guideline levels for career criminals were established by using the statutory maximum for the offense of conviction to determine the class of felony provided in 18 U.S.C. 3559. Then the maximum authorized sentence of imprisonment for each class of felony was determined as provided by 18 U.S.C. 3581. A guideline range for each class of felony was then chosen so that the

maximum of the guideline range was at or near the maximum provided in 18 U.S.C. 3581.

Section 4B1.2 provides the definitions for § 4B1.1. The definition of the term "crime of violence", as that term is used in 28 U.S.C. 994(h), is taken from Section 1001 of the Comprehensive Crime Control Act of 1984, which defined the term for purposes of all of Title 18, United States Code. See S. Rep. 98-225, 98th Cong., 1st Sess. 307 (1983).

The term "controlled substance offense" is defined to include the offenses described in 28 U.S.C. 994(h), as these offenses have been modified by amendments to the Controlled Substances Act made by the Anti-Drug Abuse Act of 1986, Pub. L. 99-570.

Section 4B1.3 implements 28 U.S.C. 994(i)(2), which directs the Commission to construct guidelines that specify a "substantial term of imprisonment" for a defendant who committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income. Under this guideline provision, the offense level is to be increased to level 13 if it is not already level 13 or greater. Probation shall not be a sentencing alternative for these offenders.

## CHAPTER FIVE—DETERMINING THE SENTENCE

*Introduction.* For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a).

### Part A—Sentencing Table

The Sentencing Table used to determine the guideline range follows:

#### SENTENCING TABLE

##### Criminal History Category

Offense level	I	II	III	IV	V	VI
	0 or 1	2 or 3	4, 5, 6	7, 8, 9	10, 11, 12	13 or more
1.....	0-1	0-2	0-3	0-4	0-5	0-6
2.....	0-2	0-3	0-4	0-5	0-6	1-7
3.....	0-3	0-4	0-5	0-6	2-8	3-9
4.....	0-4	0-5	0-6	2-8	4-10	6-12
5.....	0-5	0-6	1-7	4-10	6-12	9-15
6.....	0-6	1-7	2-8	6-12	9-15	12-18
7.....	1-7	2-8	4-10	8-14	12-18	15-21
8.....	2-8	4-10	6-12	10-16	15-21	18-24
9.....	4-10	6-12	8-14	12-18	18-24	21-27
10.....	6-12	8-14	10-16	15-21	21-27	24-30
11.....	8-14	10-16	12-18	18-24	24-30	27-33
12.....	10-16	12-18	15-21	21-27	27-33	30-37
13.....	12-18	15-21	18-24	24-30	30-37	33-41
14.....	15-21	18-24	21-27	27-33	33-41	37-46
15.....	18-24	21-27	24-30	30-37	37-46	41-51
16.....	21-27	24-30	27-33	33-41	41-51	46-57
17.....	24-30	27-33	30-37	37-46	46-57	51-63
18.....	27-33	30-37	33-41	41-51	51-63	57-71
19.....	30-37	33-41	37-46	46-57	57-71	63-78
20.....	33-41	37-46	41-51	51-63	63-78	70-87
21.....	37-46	41-51	46-57	57-71	70-87	77-96
22.....	41-51	46-57	51-63	63-78	77-96	84-105
23.....	46-57	51-63	57-71	70-87	84-105	92-115
24.....	51-63	57-71	63-78	77-96	92-115	100-125
25.....	57-71	63-78	70-87	84-105	100-125	110-137
26.....	63-78	70-87	78-97	92-115	110-137	120-150
27.....	70-87	78-97	87-108	100-125	120-150	130-162
28.....	78-97	87-108	97-121	110-137	130-162	140-175
29.....	87-108	97-121	108-135	121-151	140-175	151-188
30.....	97-121	108-135	121-151	135-168	151-188	168-210
31.....	108-135	121-151	135-168	151-188	168-210	188-235
32.....	121-151	135-168	151-188	168-210	188-235	210-262
33.....	135-168	151-188	168-210	188-235	210-262	235-293
34.....	151-188	168-210	188-235	210-262	235-293	262-327
35.....	168-210	188-235	210-262	235-293	262-327	292-365
36.....	188-235	210-262	235-293	262-327	292-365	324-405
37.....	210-262	235-293	262-327	292-365	324-405	360-life

## SENTENCING TABLE—Continued

## Criminal History Category

Offense level	I	II	III	IV	V	VI
	0 or 1	2 or 3	4, 5, 6	7, 8, 9	10, 11, 12	13 or more
38.....	235-293	262-327	292-365	324-405	360-life	360-life
39.....	262-327	292-365	324-405	360-life	360-life	360-life
40.....	292-365	324-405	360-life	360-life	360-life	360-life
41.....	324-405	360-life	360-life	360-life	360-life	360-life
42.....	360-life	360-life	360-life	360-life	360-life	360-life
43.....	life	life	life	life	life	life

## Part B—Probation

18 U.S.C. 3561

18 U.S.C. 3563

## § 5B1.1. Imposition of a Term of Probation

(a) Subject to the statutory restrictions in subsection (b) below, sentence of probation is authorized:

(1) If the minimum term of imprisonment in the range specified by the Sentencing Table in Part A, is zero months;

(2) If the minimum term of imprisonment specified by the Sentencing Table is at least one but not more than six months, provided that the court imposes a condition or combination of conditions requiring intermittent confinement or community confinement as provided in § 5C2.1(c)(2) (Imposition of a Term of Imprisonment).

(b) A sentence of probation may not be imposed in the event:

(1) The offense of conviction is a Class A or B felony, 18 U.S.C. 3561(a)(1);

(2) The offense of conviction expressly precludes probation as a sentence, 18 U.S.C. 3561(a)(2);

(3) The defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. 3561(a)(3).

## § 5B1.2. Term of Probation

(a) When probation is imposed, the term shall be:

(1) At least one year but not more than five years if the offense level is 6 or greater;

(2) No more than three years in any other case.

## § 5B1.3. Conditions of Probation

(a) If a term of probation is imposed, the court shall impose a condition that the defendant shall not commit another federal, state, or local crime during the term of probation. 18 U.S.C. 3563(a)(1).

(b) The court may impose other conditions that (1) are reasonably related to the nature and circumstances

of the offense, the history and characteristics of the defendant, and the purposes of sentencing and (2) involve only such deprivations of liberty or property as are reasonably necessary to effect the purposes of sentencing. 18 U.S.C. 3563(b). Recommended conditions are set forth in § 5B1.4.

(c) If a term of probation is imposed for a felony, the court shall impose at least one of the following as a condition of probation: a fine, an order of restitution, or community service. 18 U.S.C. 3563(a)(2).

(d) Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation. 18 U.S.C. 3563(b)(11). Intermittent confinement shall be credited toward the guideline term of imprisonment at § 5C2.1 as provided in the schedule at § 5C2.1(e).

## COMMENTARY

The Comprehensive Crime Control Act of 1984 makes probation a sanction in and of itself. 18 U.S.C. 3561. Probation may be used as an alternative to incarceration provided that the terms of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including promoting respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant.

Section 5C1.1 provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case unless prohibited by statute or inconsistent with the requirements of the guideline for the imposition of a term of imprisonment, § 5C2.1 (Imposition of a Term of Imprisonment). Given these restraints, the court may impose a sentence of probation where the minimum term of imprisonment in the range is zero months and may not impose probation where the minimum term in the range is more than six months. Subsection 5B1.1(a)(2) provides a transition between those offenses where a probationary term is allowed and those where probation is prohibited. Where the guidelines call for a minimum term of imprisonment of at least one but not more than six months, the court may impose a sentence of probation provided that it includes, as a condition of that

probation, an incarceration alternative requiring intermittent confinement, community confinement, or a combination thereof.

Subsection 5B1.2(b)(3) reflects Congressional intent that split sentences of imprisonment and probation be abolished. S. Rep. No. 225, 98th Cong., 1st Sess. 89.

Section 5B1.2 governs the length of a term of probation. Subject to statutory restrictions, the guidelines provide that a term of probation may not exceed three years if the offense level is less than 6. If a defendant has an offense level of 6 or greater, the guidelines provide that a term of probation be at least one year but not more than five years. Although some distinction in the length of a term of probation is warranted based on the circumstances of the case, a term of probation may also be used to enforce conditions such as fine or restitution payments, or attendance in a program of treatment such as drug rehabilitation. Often, it may not be possible to determine the amount of time required for the satisfaction of such payments or programs in advance. This issue has been resolved by setting forth two broad ranges for the duration of a term of probation depending upon the offense level. Within the guidelines set forth in this section, the determination of the length of a term of probation is within the discretion of the sentencing judge.

Section 5B1.3 describes mandatory and discretionary conditions of probation.

## § 5B1.4. Recommended Conditions of Probation and Supervised Release (Policy Statement)

(a) The following "standard" conditions (1-13) are those that are generally recommended for both probation and supervised release:

(1) The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) The defendant shall support his dependents and meet other family responsibilities;

(5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

(7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or

administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

(8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) The defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

(b) The following "special" conditions of probation and supervised release (14-24) are those that are either recommended or required by law under the circumstances described:

(14) Possession of Weapons. If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense, it is recommended that the court impose a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(15) Restitution. If the court imposes an order of restitution, it is recommended that the court impose a condition requiring the defendant to make payment of restitution or adhere to a court ordered installment schedule for payment of restitution. See § 5E4.1 (Restitution).

(16) Fines. If the court imposes a fine, it is recommended that the court impose a condition requiring the defendant to pay the fine or adhere to a court ordered installment schedule for payment of the fine.

(17) If an installment schedule of payment of restitution or fines is imposed, it is recommended that the court impose a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(18) Access to Financial Information. If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine, it is recommended that the court impose a condition requiring the defendant to provide the probation officer access to any requested financial information.

(19) Community Confinement. Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation or supervised release. See § 5F5.1 (Community Confinement).

(20) Home Detention. Home detention may be imposed as a condition of probation or supervised release. See § 5F5.2 (Home Detention).

(21) Community Service. Community service may be imposed as a condition of probation or supervised release. See § 5F5.3 (Community Service).

(22) Occupational Restrictions. Occupational restrictions may be imposed as a condition of probation or supervised release. See § 5F5.5 (Occupational Restrictions).

(23) Substance Abuse Program Participation. If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol, it is recommended that the court impose a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

(24) Mental Health Program Participation. If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment, it is recommended that the court impose a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

#### Part C—Imprisonment

18 U.S.C. 3581

18 U.S.C. 3582

#### § 5C2.1. Imposition of a Term of Imprisonment

(a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the guideline range.

(b) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is zero months, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.

(c) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is at least one but not more than six months, the minimum term may be satisfied by (1) a sentence of imprisonment; (2) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement or community confinement for imprisonment according to the schedule in § 5C2.1(e); or (3) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement according to the schedule in § 5C2.1(e), provided that at least one-half of the minimum term, but in no event less than one month, is satisfied by imprisonment.

(d) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than six months but not more than ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement according to the schedule in § 5C2.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.

(e) Schedule of Substitute Punishments:

(1) Thirty days of intermittent confinement in prison or jail for one month of imprisonment (for purposes of this provision, each twenty-four hours of confinement is credited as a day of intermittent confinement);

(2) One month of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one month of imprisonment.

(f) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than ten months, the guidelines require that the minimum term be satisfied by a sentence of imprisonment.

#### COMMENTARY

The court shall determine the appropriate sentence within the applicable guideline range. For example, if the offense level is 20, Criminal History Category I, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.

Subsection 5C2.1(b) provides that if the minimum term of imprisonment set forth in the Sentencing Table is zero months, the court is permitted, but not required, to impose a sentence of probation unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense.

Subsection 5C2.1(c) provides that if the minimum term of imprisonment set forth in the Sentencing Table of at least one but not more than six months, the minimum term may be satisfied by a sentence of imprisonment, a sentence of probation with a condition requiring a period of intermittent confinement or community confinement; or a sentence of imprisonment that includes a term of supervised release with a condition requiring a period of community confinement, provided that at least one-half of the minimum term, but in no event less than one month, is satisfied by imprisonment.

Subsection 5C2.1(d) provides that if the minimum term of imprisonment set forth in the Sentencing Table of more than six but not more than ten months, the minimum term may be satisfied by a sentence of imprisonment; or a sentence of imprisonment that includes a term of supervised release with a condition requiring a period of community confinement, provided that at least one-half of the minimum term is satisfied by imprisonment. For example, if the guideline calls for eight months of imprisonment, the court may decide to impose a four-month term of imprisonment to be followed by four months in a halfway house.

As noted previously, 18 U.S.C. 3561(a)(3) prohibits the imposition of a sentence of probation where the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. While this provision has effectively abolished the use of 'split sentences' imposed pursuant to the former 18 U.S.C. 3561, the drafters of the Sentencing Reform Act noted that the functional equivalent of the split sentence could be "achieved by a more direct and logically consistent route" by providing that a defendant serve a term of imprisonment followed by a period of supervised release. (S. Rep. No. 225, 98th Cong., 1st Sess. 89).

There may be cases in which a departure from the guidelines by substitution of a longer period of community confinement than otherwise authorized for an equivalent number of months of imprisonment is warranted to accomplish a specific treatment purpose (e.g., substitution of twelve months in an approved residential drug treatment program for twelve months of imprisonment). Such a substitution should be considered only in cases where the defendant's criminality is related to the treatment problem to be addressed and there is a reasonable likelihood that successful completion of the treatment program will eliminate that problem.

Subsection 5C2.1(e) sets forth a schedule of imprisonment substitutes. Home detention may not be substituted for imprisonment.

The use of substitutes for imprisonment as provided in § 5C2.1 (c) and (d) is generally not warranted in the case of a defendant with

a criminal history category greater than Category II. Such defendants have generally not benefited from previous application of such alternatives.

Subsection 5C2.1(f) provides that, if the minimum term of imprisonment set forth in the Sentencing Table is more than ten months, the minimum term must be satisfied by a sentence of imprisonment without the use of any of the incarceration alternatives in § 5C2.1(e).

#### Part D—Supervised Release

18 U.S.C. 3583

##### § 5D3.1. Imposition of a Term of Supervised Release

(a) The court shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed, or when required by statute.

(b) The court may order a term of supervised release to follow imprisonment in any other case.

##### § 5D3.2. Term of Supervised Release

(a) If a defendant is convicted under a statute that requires a term of supervised release, the term shall be at least three years but not more than five years, or the minimum period required by statute, whichever is greater.

(b) Otherwise, when a term of supervised release is ordered, the length of the term shall be:

- (1) Three years for a defendant convicted of a Class A or B felony;
- (2) Two years for a defendant convicted of a Class C or D felony;
- (3) One year for a defendant convicted of a Class E felony or a misdemeanor.

##### § 5D3.3. Conditions of Supervised Release

(a) If a term of supervised release is imposed, the court shall impose a condition that the defendant not commit another federal, state, or local crime. 18 U.S.C. 3583(d).

(b) In order to fulfill any authorized purposes of sentencing, the court may impose other conditions reasonably related to (1) the nature and circumstances of the offense, and (2) the history and characteristics of the defendant. 18 U.S.C. 3583(d).

(c) Recommended conditions of supervised release are set forth in § 5B1.4.

#### COMMENTARY

Subsection 5D3.1(a) requires imposition of supervised release following any sentence of imprisonment for a term of more than one year or if required by a specific statute. While there may be cases within this category that do not require post release supervision, these cases are the exception and may be handled by departure from the guideline requiring post release supervision.

Under § 5D3.1(b), the court may impose a term of supervised release in cases involving imprisonment for a term of one year or less. The court may consider the need for a term of supervised release to facilitate the reintegration of the defendant into the community; to enforce a fine, restitution order, or other condition; or to fulfill any other purpose authorized by statute.

Section 5D3.2 specifies the length of a term of supervised release that is to be imposed. Subsection (a) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release. Subsection (b) applies to all other statutes, and specifies terms that are the maximum permitted by law.

Section 5D3.3 applies to conditions of supervised release. The conditions generally recommended for supervised release are those recommended for probation. See § 5B1.4.

#### Part E—Restitution, Fines, Assessments, Forfeitures

18 U.S.C. 1956–1957

18 U.S.C. 1963

18 U.S.C. 3013

18 U.S.C. 3553–3554

18 U.S.C. 3556

18 U.S.C. 3571–3572

18 U.S.C. 3579

18 U.S.C. 3614

18 U.S.C. 3663–3664

18 U.S.C. 3681–3682

21 U.S.C. 841

21 U.S.C. 848

21 U.S.C. 853

21 U.S.C. 960

##### § 5E4.1. Restitution

(a) Restitution shall be ordered for convictions under Title 18 of the United States Code or under 49 U.S.C. 1472 (h), (i), (j) or (n) in accordance with 18 U.S.C. § 3663(d).

(b) If a defendant is ordered to make restitution and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

#### COMMENTARY

Section 3553(a)(7) of Title 18 requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Section 3556 of Title 18 authorizes the court to impose restitution in accordance with 18 U.S.C. 3663 and 3664 for violations of Title 18 and of designated subdivisions of 49 U.S.C. 1472. Restitution is not precluded, however, as a condition of probation or supervised release for other offenses. See S. Rep. No. 225, 98th Cong., 1st Sess. 95–96. An order of restitution may be appropriate in offenses not specifically referenced in 18 U.S.C. 3663 where victims require relief more promptly than the civil justice system provides.

Section 3663(d) requires the court to "impose an order of restitution to the extent

that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong sentencing." If the court does not order restitution, or orders only partial restitution, it must state its reasons for doing so. 18 U.S.C. 3663(a)(2).

In determining whether to impose an order of restitution, and the amount of restitution, the court shall consider the amount of loss the victim suffered as a result of the offense, the financial resources of the defendant, the financial needs of the defendant and his dependents, and other factors the court deems appropriate. 18 U.S.C. 3664(a).

Pursuant to Rule 32(c)(2)(D), Federal Rules of Criminal Procedure, the probation officer's presentence investigation report must contain a victim impact statement. That report must contain information about the financial impact on the victim and the defendant's financial condition. The sentencing judge may base findings on the presentence report or other testimony or evidence supported by a preponderance of evidence. 18 U.S.C. 3664(d).

A court's authority to deny restitution is limited. Even "in those unusual cases where the precise amount owed is difficult to determine, section 3579(d) [the identical predecessor of section 3663(d)] authorizes the court to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim." S. Rep. No. 532, 97th Cong., 2d Sess. 31, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2537.

Unless the court orders otherwise, restitution must be made immediately. 18 U.S.C. 3663(f)(3). The court may permit the defendant to make restitution within a specified period or in specified installments, provided that the last installment is paid not later than the expiration of probation, five years after the end of the defendant's term of imprisonment, or in any other case five years after the date of sentencing. 18 U.S.C. 3663(f)(1) and (2). The restitution order should specify how and to whom payment is to be made.

#### § 5E4.2. Fines for Individual Defendants

(a) Except as provided in subsection (f) below, the court shall impose a fine in all cases. If the guideline for the offense in Chapter Two prescribes a different rule for imposing fines, that rule takes precedence over this subsection.

(b) The generally applicable minimum and maximum fine for each offense level is shown in the Fine Table in subsection (c) below. Unless a statute expressly authorizes a greater amount, no fine may exceed \$250,000 for a felony or a misdemeanor resulting in the loss of human life; \$25,000 for any other misdemeanor; or \$1,000 for an infraction. 18 U.S.C. 3571(b)(1).

(c)(1) The minimum fine range is the greater of:

(A) The amount shown in column A of the table below; or

(B) Any monetary gain to the defendant, less any restitution made or ordered.

(2) Except as specified in (4) below, the maximum fine is the greater of:

(A) The amount shown in column B of the table below;

(B) Twice the estimated loss caused by the offense; or

(C) Three times the estimated gain to the defendant.

(3)

FINE TABLE

Offense level	A		B	
	Mini-	maxi-	maxi-	maxi-
1.....	\$25		\$250	
2-3.....	100		1,000	
4-5.....	250		2,500	
6-7.....	500		5,000	
8-9.....	1,000		10,000	
10-11.....	2,000		20,000	
12-13.....	3,000		30,000	
14-15.....	4,000		40,000	
16-17.....	5,000		50,000	
18-19.....	6,000		60,000	
20-22.....	7,500		75,000	
23-25.....	10,000		100,000	
26-28.....	12,500		125,000	
29-31.....	15,000		150,000	
32-34.....	17,500		175,000	
35-37.....	20,000		200,000	
38 and above.....	25,000		250,000	

(4) Subsection (c)(2), limiting the maximum fine, does not apply if the defendant is convicted under a statute authorizing (A) a maximum fine greater than \$250,000, or (B) a fine for each day of violation. In such cases, the court may impose a fine up to the maximum authorized by the statute.

(d) In determining the amount of the fine, the court shall consider:

(1) The need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence;

(2) The ability of the defendant to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources;

(3) The burden that the fine places on the defendant and his dependents relative to alternative punishments;

(4) Any restitution or reparation that the defendant has made or is obligated to make;

(5) Any collateral consequences of conviction, including civil obligations arising from the defendant's conduct;

(6) Whether the defendant previously has been fined for a similar offense; and

(7) Any other pertinent equitable considerations.

(e) The amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive.

(f) If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents, the court may impose a lesser fine or waive the fine. In these circumstances, the court shall consider alternative sanctions in lieu of all or a portion of the fine, and must still impose a total combined sanction that is punitive. Although any additional sanction not proscribed by the guidelines is permissible, community service is the generally preferable alternative in such instances.

(g) If the defendant establishes that payment of the fine in a lump sum would have an unduly severe impact on him or his dependents, the court should establish an installment schedule for payment of the fine. The length of the installment schedule generally should not exceed twelve months, and shall not exceed the maximum term of probation authorized for the offense. The defendant should be required to pay a substantial installment at the time of sentencing. If the court authorizes a defendant sentenced to probation or supervised release to pay a fine on an installment schedule, the court shall require as a condition of probation or supervised release that the defendant pay the fine according to the schedule. The court also may impose a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit unless he is in compliance with the payment schedule.

(h) If the defendant knowingly fails to pay a delinquent fine, the court shall resentence him in accordance with 18 U.S.C. 3614.

(i) Notwithstanding of the provisions of subsection (c) of this section, but subject to the provisions of subsection (f) herein, the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered.

#### COMMENTARY

These guidelines permit a relatively wide range of fines. The Commission may promulgate more detailed guidelines for the imposition of fines after analyzing practice under these initial guidelines. Recent legislation provides for substantial increases

in fines. 18 U.S.C. 3571(b). With few restrictions, 42 U.S.C. 10601 (b), and (c) authorize fine payments up to \$100 million to be deposited in the Crime Victims Fund in the United States Treasury. With vigorous enforcement by the Department of Justice and United States Probation Officers, higher fines will be effective punitive and deterrent sanctions.

Subsection 5E4.2(c)(2) provides for alternative calculations of the maximum fine as three times the gain or twice the loss. These alternatives are, of course, subject to the applicable statutory maximums. Different multiples were chosen to reflect the fact that most offenses result in losses to society that are larger than the provable gain to defendants. When only the gain can be estimated, it is likely that the court will be unable to require restitution. Hence, a higher multiple of the gain is needed to approximate a fine based on the loss involved. It is intended that these alternatives will not require precise calculation.

Subsection 5E4.2(c)(4) applies to statutes that contain special provisions permitting larger fines. These statutes include, among others: 21 U.S.C. 841(b) and 960(b), which authorize fines up to \$8 million in offenses involving the manufacture, distribution, or importation of certain controlled substances; 21 U.S.C. 848(a), which authorizes fines up to \$4 million in offenses involving the manufacture or distribution of controlled substances by a continuing criminal enterprise; 18 U.S.C. 1956(a), which authorizes a fine equal to the greater of \$500,000 or two times the value of the monetary instruments or funds involved in offenses involving money laundering of financial instruments; 18 U.S.C. 1957(b)(2), which authorizes a fine equal to two times the amount of any criminally derived property involved in a money laundering transaction; 33 U.S.C. 1319(c), which authorizes a fine of up to \$50,000 per day for violations of the Water Pollution Control Act; 42 U.S.C. 6928(d), which authorizes a fine of up to \$50,000 per day for violations of the Resource Conservation Act; and 42 U.S.C. 7413(c), which authorizes a fine of up to \$25,000 per day for violations of the Clean Air Act.

The existence of income or assets that the defendant failed to disclose may justify a larger fine than that which otherwise would be warranted under § 5E4.2. The court may base its conclusion as to this factor on information revealing significant unexplained expenditures by the defendant or unexplained possession of assets that do not comport with the defendant's reported income. If the court concludes that the defendant willfully misrepresented all or part of his income or assets, it may aggravate his sentence in accordance with Chapter Three, Part C (Obstruction).

If no term of imprisonment is imposed and the fine is not paid in full at the time of sentencing, it is recommended that the court sentence the defendant to a term of probation, and that payment of the fine be a condition of probation. If a fine is imposed in addition to a term of imprisonment, it is recommended that the court impose a term of supervised release following imprisonment as a means of enforcing payment of the fine.

Subsection 5E4.2(i) provides for an additional fine sufficient to pay the costs of any imprisonment, probation, or supervised release ordered, subject to the defendant's ability to pay as prescribed in subsection 5E4.2(f). In making a determination as to the amount of any fine to be imposed under this provision, the court may be guided by reports published by the Bureau of Prisons and the Administrative Office of the United States Courts concerning such costs.

#### § 5E4.3. Special Assessments

A special assessment must be imposed on a convicted defendant in the amount prescribed by statute.

#### COMMENTARY

The Victims of Crime Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires the courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation. Monies deposited in the fund are awarded to the states by the Attorney General for victim assistance and compensation programs.

The Act requires the court to impose assessments in the following amounts:

\$25, if the defendant is an individual convicted of a misdemeanor;

\$50, if the defendant is an individual convicted of a felony;

\$100, if the defendant is an organization convicted of a misdemeanor; and

\$200, if the defendant is an organization convicted of a felony. 18 U.S.C. 3013.

The Act does not authorize the court to waive imposition of the assessment.

#### § 5E4.4. Forfeiture

Forfeiture is to be imposed upon a convicted defendant as provided by statute.

#### COMMENTARY

Forfeiture generally. Forfeiture provisions exist in various statutes. For example, 18 U.S.C. 3554 requires a court imposing a sentence under 18 U.S.C. 1962 (proscribing the use of the proceeds of racketeering activities in the operation of an enterprise engaged in interstate commerce) or Titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (proscribing the manufacture and distribution of controlled substances) to order the forfeiture of property in accordance with 18 U.S.C. 1963 and 21 U.S.C. 853, respectively. Those provisions require the automatic forfeiture of certain property upon conviction of their respective underlying offenses.

Special Forfeiture of Collateral Profits of Crime. The provisions of 18 U.S.C. 3681-3682 authorize a court, in certain circumstances, to order the forfeiture of a violent criminal's proceeds from the depiction of his crime in a book, movie, or other medium. Those sections authorize the deposit of proceeds in an escrow account in the Crime Victims Fund of the United States Treasury. The money is to remain available in the account for five years to satisfy claims brought against the defendant by the victim(s) of his offenses. At the end of the five-year period, the court may require that any proceeds remaining in the

account be released from escrow and paid into the Fund. 18 U.S.C. 3681(c)(2).

#### Part F—Sentencing Options

18 U.S.C. 3553

18 U.S.C. 3555

18 U.S.C. 3563

18 U.S.C. 3583

18 U.S.C. 3663

18 U.S.C. 3742

#### § 5F5.1. Community Confinement

Community confinement may be imposed as a condition of probation or supervised release.

#### COMMENTARY

"Community confinement" means residence in a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community facility, and community service, gainful employment, or treatment during non-residential hours.

Community confinement generally should not be imposed for a period in excess of six months. A longer period may be imposed to accomplish the objectives of a specific rehabilitative program, such as drug rehabilitation. The sentencing judge may impose other discretionary conditions of probation or supervised release appropriate to effectuate community confinement.

#### § 5F5.2. Home Detention

Home detention may be imposed as a condition of probation or supervised release.

#### COMMENTARY

"Home detention" means a program of confinement and supervision that restricts the defendant to his place of residence continuously, or during specified hours, enforced by appropriate means of surveillance by the probation office. The judge may also impose other conditions of probation or supervised release appropriate to effectuate home detention. If the confinement is only during specified hours, the defendant shall engage exclusively in gainful employment, community service or treatment during the non-residential hours.

Home detention generally should not be imposed for a period in excess of six months. However, a longer term may be appropriate for disabled, elderly or extremely ill defendants who would otherwise be imprisoned.

#### § 5F5.3. Community Service

(a) Community service may be ordered as a condition of probation or supervised release. If the defendant was convicted of a felony, the court must order one or more of the following sanctions: a fine, restitution, or community service. 18 U.S.C. 3563(a)(2).

(b) With the consent of the victim of the offense, the court may order a defendant to perform services for the

benefit of the victim in lieu of monetary restitution. 18 U.S.C. 3663(b)(4).

#### COMMENTARY

Community service generally should not be imposed in excess of 400 hours. Longer terms of community service impose heavy administrative burdens relating to the selection of suitable placements and the monitoring of attendance.

#### § 5F5.4. Order of Notice to Victims

The court may order the defendant to pay the cost of giving notice to victims pursuant to 18 U.S.C. 3555. This cost may be set off against any fine imposed if the court determines that the imposition of both sanctions would be excessive.

#### COMMENTARY

In cases where a defendant has been convicted of an offense involving fraud or "other intentionally deceptive practices," the court may order the defendant to "give reasonable notice and explanation of the conviction, in such form as the court may approve" to the victims of the offense. 18 U.S.C. 3555. The court may order the notice to be given by mail, by advertising in specific areas or through specific media, or by other appropriate means. In determining whether a notice is appropriate, the court must consider the generally applicable sentencing factors listed in 18 U.S.C. 3553(a) and the cost involved in giving the notice as it relates to the loss caused by the crime. The court may not require the defendant to pay more than \$20,000 to give notice.

If an order of notice to victims is under consideration, the court must notify the government and the defendant. 18 U.S.C. 3553(d). Upon motion of either party, or on its own motion, the court must: (1) permit the parties to submit affidavits and memoranda relevant to the imposition of such an order; (2) provide counsel for both parties the opportunity to address orally, in open court, the appropriateness of such an order; and (3) if it issues such an order, state its reasons for doing so. The court may also order any additional procedures that will not unduly complicate or prolong the sentencing process.

The legislative history indicates that, although the sanction was designed to provide actual notice to victims, a court might properly limit notice to only those victims who could be most readily identified, if to do otherwise would unduly prolong or complicate the sentencing process.

#### § 5F5.5. Occupational Restrictions

(a) The court may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation, business, or profession, or limiting the terms on which the defendant may do so, only if it determines that:

(1) A reasonably direct relationship existed between the defendant's occupation, business, or profession and the conduct relevant to the offense of conviction;

(2) There is a risk that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted; and

(3) Imposition of such a restriction is reasonably necessary to protect the public.

(b) If the court decides to impose a condition of probation or supervised release restricting a defendant's engagement in a specified occupation, business, or profession, the court shall impose the condition for the minimum time and to the minimum extent necessary to protect the public.

#### COMMENTARY

The Comprehensive Crime Control Act authorizes the imposition of occupational restrictions as a condition of probation, 18 U.S.C. 3563(b)(6), or supervised release, 18 U.S.C. 3583(d). Pursuant to section 3563(b)(6), a court may require a defendant to:

[R]efrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances.

Section 3583(d) incorporates this section by reference. The Senate Judiciary Committee Report on the Comprehensive Crime Control Act explains that the provision was "intended to be used to preclude the continuation or repetition of illegal activities while avoiding a bar from employment that exceeds that needed to achieve that result." S. Rep. No. 225, 98th Cong., 1st Sess. 96-97. The condition "should only be used as reasonably necessary to protect the public. It should not be used as a means of punishing the convicted person." *Id.* at 96. Section 5A5.5 accordingly limits the use of the condition and, if imposed, limits its scope, to the minimum reasonably necessary to protect the public.

The appellate review provisions permit a defendant to challenge the imposition of a probation condition under 18 U.S.C. 3563(b)(6) if "the sentence includes . . . a more limiting condition of probation or supervised release under section 3563(b)(6) . . . than the maximum established in the guideline." 18 U.S.C. 3742(a)(3)(A). The government may appeal if the sentence includes a "less limiting" condition of probation than the minimum established in the guideline. 18 U.S.C. 3742(b)(3)(A).

The Comprehensive Crime Control Act expressly authorizes promulgation of policy statements regarding the appropriate use of conditions of probation and supervised release. 28 U.S.C. 994(a)(2)(B). The Act does not expressly grant the authority to issue guidelines on the subject. The appellate review provisions of the Act, however, authorize appeals of occupational restrictions that deviate from the minimum and maximum limitations "established in the guideline" (emphasis added).

#### Part G—Implementing the Total Sentence of Imprisonment

##### § 5G1.1. Sentencing on a Single Count of Conviction

(a) If application of the guidelines results in a sentence above the maximum authorized by statute for the offense of conviction, the statutory maximum shall be the guideline sentence.

(b) If application of the guidelines results in a sentence below the minimum sentence required by statute, the statutory minimum shall be the guideline sentence.

(c) In any other case, the sentence imposed shall be the sentence as determined from application of the guidelines.

##### § 5G1.2. Sentencing on Multiple Counts of Conviction

(a) The sentence to be imposed on a count for which the statute mandates a consecutive sentence shall be determined and imposed independently.

(b) Except as otherwise required by law (see § 5G1.1 (a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter.

(c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.

(d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects sentences on all counts shall run concurrently, except to the extent otherwise required by law.

##### § 5G1.3. Convictions on Counts Related to Unexpired Sentences

If at the time of sentencing, the defendant is already serving one or more unexpired sentences, then the sentences for the instant offense(s) shall run consecutively to such unexpired sentences, unless one or more of the instant offense(s) arose out of the same transactions or occurrences as the unexpired sentences. In the latter case, such instant sentences and the unexpired sentences shall run concurrently, except to the extent otherwise required by law.

## COMMENTARY

§ 5G1.1. This section simply states that if the statute requires imposition of a sentence other than that required by the guidelines, the statute shall control.

§ 5G1.2. This section specifies the procedure for determining the sentence that will be formally imposed on each count in order to produce the total punishment that is appropriate under the circumstances of a multiple count case. When one of the counts carries a statutory maximum adequate to permit imposition of the total punishment, the total punishment can be imposed on that count and the punishment on all other counts (equal to the lesser of the total punishment or the applicable statutory maximum) can run concurrently. When no count carries an adequate statutory maximum, consecutive sentences are imposed but only to the extent necessary to produce the total punishment, as determined in accordance with § 3D1.5.

Counts for which the statute mandates a consecutive sentence, such as counts charging the use of a firearm in a violent crime (18 U.S.C. 924(c)) are treated separately. The sentence imposed on such a count is the sentence indicated for the offense of conviction, determined in accordance with Chapter Two. That sentence then runs consecutively to the sentences imposed on the other counts. See Commentary to § 2K2.4 regarding determination of the offense levels for related counts when a conviction under 18 U.S.C. 924(c) is involved.

§ 5G1.3. This section reflects the statutory presumption that sentences imposed at different times ordinarily run consecutively. See 18 U.S.C. 3584(a). This presumption does not apply when the new counts arise out of the same transaction or occurrence as a prior conviction.

### Part H—Specific Offender Characteristics

*Introduction.* Congress has directed the Commission to consider whether certain specific offender characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined relevant by the Commission. 28 U.S.C. 994(d).

#### § 5H1.1. Age (Policy Statement)

Age is not ordinarily relevant in determining whether a sentence should be outside the guidelines. Neither is it ordinarily relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. Age may be a reason to go below the guidelines when the offender is elderly and infirm and where a form of punishment (e.g., home confinement) might be equally efficient as and less costly than incarceration. If, independent of the consideration of age, a defendant is sentenced to probation or

supervised release, age may be relevant in the determination of the length and conditions of supervision.

#### § 5H1.2. Education and Vocational Skills (Policy Statement)

Education and vocational skills are not ordinarily relevant in determining whether a sentence should be outside the guidelines, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. See § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). Neither are education and vocational skills relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. If, independent of consideration of education and vocational skills, a defendant is sentenced to probation or supervised release, these considerations may be relevant in the determination of the length and conditions of supervision for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the type or length of community service.

#### § 5H1.3. Mental and Emotional Conditions (Policy Statement)

Mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the guidelines, except as provided in the general provisions in Chapter Five. Mental and emotional conditions, whether mitigating or aggravating, may be relevant in determining the length and conditions of probation or supervised release.

#### § 5H1.4. Physical Condition, Including Drug Dependence and Alcohol Abuse (Policy Statement)

Physical condition is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. However, an extraordinary physical impairment may be a reason to impose a sentence other than imprisonment.

Drug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program. If participation in a substance abuse program is required,

the length of supervised release should take into account the length of time necessary for the supervisory body to judge the success of the program.

This provision would also apply in cases where the defendant received a sentence of probation. The substance abuse condition is strongly recommended and the length of probation should be adjusted accordingly. Failure to comply would normally result in revocation of probation.

#### § 5H1.5. Previous Employment Record (Policy Statement)

Employment record is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. Employment record may be relevant in determining the type of sentence to be imposed when the guidelines provide for sentencing options. If, independent of the consideration of employment record, a defendant is sentenced to probation or supervised release, considerations of employment record may be relevant in the determination of the length and conditions of supervision.

#### § 5H1.6. Family Ties and Responsibilities, and Community Ties (Policy Statement)

Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the guidelines. Family responsibilities that are complied with are relevant in determining whether to impose restitution and fines. Where the guidelines provide probation as an option, these factors may be relevant in this determination. If a defendant is sentenced to probation or supervised release, family ties and responsibilities that are met may be relevant in the determination of the length and conditions of supervision.

#### § 5H1.7. Role in the Offense (Policy Statement)

A defendant's role in the offense is relevant in determining the appropriate sentence. See Chapter Three, Part B, (Role in the Offense).

#### § 5H1.8. Criminal History (Policy Statement)

A defendant's criminal history is relevant in determining the appropriate sentence. See Chapter Four, (Criminal History).

### § 5H1.9. Dependence Upon Criminal Activity for a Livelihood (Policy Statement)

The degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence. See Chapter Four, Part B (Career Offenders and Criminal Livelihood).

### § 5H1.10. Race, Sex, National Origin, Creed, Religion and Socio-Economic Status (Policy Statement)

These factors are not relevant in the determination of a sentence.

## Part J—Relief From Disability Pertaining to Certain Employment

### § 5J1.1. Relief From Disability Pertaining to Certain Employment (Policy Statement)

With regard to labor racketeering offenses, a part of the punishment imposed by 29 U.S.C. 504 and 511 is the prohibition of convicted persons from service in labor unions, employer associations, employee benefit plans, and as labor relations consultants. Violations of these provisions are felony offenses. Persons convicted after October 12, 1984, may petition the sentencing court to reduce the statutory disability (thirteen years after sentence or imprisonment, whichever is later) to a lesser period (not less than three years after entry of judgment in the trial court). After November 1, 1987, petitions for exemption from the disability that were formerly administered by the United States Parole Commission will be transferred to the courts. Relief shall not be given in such cases to aid rehabilitation, but may be granted only following a clear demonstration by the convicted person that he has been rehabilitated since commission of the crime.

## Part K—Departures

### 1. Substantial Assistance to Authorities

#### § 5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has made a good faith effort to provide substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following conduct:

(1) The court's evaluation of the significance and usefulness of the defendant's assistance, taking into

consideration the government's evaluation of the assistance rendered;

(2) The truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) The nature and extent of the defendant's assistance;

(4) Any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) The timeliness of the defendant's assistance.

#### § 5K1.2. Refusal to Assist (Policy Statement)

A defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor.

### COMMENTARY

Under circumstances set forth in 28 U.S.C. 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum mandatory sentence.

A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.

Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

The Commission considered and rejected the use of a defendant's refusal to assist authorities as an aggravating sentencing factor. Refusal to assist authorities based upon continued involvement in criminal activities and association with accomplices may be considered, however, in evaluating a defendant's sincerity in claiming acceptance of responsibility.

### 2. General Provisions: (Policy Statement)

Under 18 U.S.C. 3553(b) the sentencing court may impose a sentence outside the

range established by the applicable guideline, if the court finds "that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing. Nonetheless, the present section seeks to aid the court by identifying some of the factors that the Commission has not been able to fully take into account in formulating precise guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing judge. Similarly, the court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines (e.g., as an adjustment or specific offense characteristic), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where the applicable guidelines, specific offense characteristics, and adjustments do take into consideration a factor listed in this part, departure from the guideline is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction. Thus, disruption of a governmental function, § 5K2.7, would have to be quite serious to warrant departure from the guidelines when the offense of conviction is bribery or obstruction of justice. When the offense of conviction is theft, however, and when the theft caused disruption of a governmental function, departure from the applicable guideline more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the offense of conviction is robbery because the robbery guideline includes a specific sentence adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does

not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

Harms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the offense of conviction, within the limitations set forth in the Overview to Chapter Two.

#### **§ 5K2.1. Death (Policy Statement)**

If death resulted, the court may increase the sentence above the authorized guideline range.

Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury. For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.

#### **§ 5K2.2. Physical Injury (Policy Statement)**

If significant physical injury resulted, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In

general, the same considerations apply as in § 5K2.1.

#### **§ 5K2.3. Extreme Psychological Injury (Policy Statement)**

If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked. Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

#### **§ 5K2.4. Abduction or Unlawful Restraint (Policy Statement)**

If a person was abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense or to facilitate the escape from the scene of the crime, the court may increase the sentence above the authorized guideline range.

#### **§ 5K2.5. Property Damage or Loss (Policy Statement)**

If the offense caused property damage or loss not taken into account within the guidelines, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction.

#### **§ 5K2.6. Weapons and Dangerous Instrumentalities (Policy Statement)**

If a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a

firearm might warrant a substantial sentence increase.

#### **§ 5K2.7. Disruption of Governmental Function (Policy Statement)**

If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

#### **§ 5K2.8. Extreme Conduct (Policy Statement)**

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

#### **§ 5K2.9. Criminal Purpose (Policy Statement)**

If the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct.

#### **§ 5K2.10. Victim's Conduct (Policy Statement)**

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:

(a) The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;

(b) The persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;

(c) The danger reasonably perceived by the defendant, including the victim's reputation for violence;

(d) The danger actually presented to the defendant by the victim; and

(e) Any other relevant conduct by the victim that substantially contributed to the danger presented.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A.3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

#### **§ 5K2.11. Lesser Harms (Policy Statement)**

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted. For example, providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected.

In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted.

#### **§ 5K2.12. Coercion and Duress (Policy Statement)**

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from

a natural emergency. The Commission considered the relevance of economic hardship and determined that personal financial difficulties and economic pressures upon a trade or business do not warrant a decrease in sentence.

#### **§ 5K2.13. Diminished Capacity (Policy Statement)**

If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

#### **§ 5K2.14. Public Welfare (Policy Statement)**

If national security, public health, or safety was significantly endangered, the court may increase the sentence above the guideline range to reflect the nature and circumstances of the offense.

### **CHAPTER SIX—SENTENCING PROCEDURES AND PLEA AGREEMENTS**

#### **Part A—Sentencing Procedures**

*Introduction.* This Part addresses sentencing procedures that are applicable in all cases, including those in which guilty or nolo contendere pleas are entered with or without a plea agreement between the parties, and convictions based upon judicial findings or verdicts.

#### **§ 6A1.1. Presentence Report**

(a) A probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553, and the court explains this finding on the record. Rule 32(c)(1), Fed.R.Crim.P. The defendant may not waive preparation of the presentence report.

(b) The presentence report shall be disclosed to the defendant, counsel for the defendant and the attorney for the government, to the maximum extent permitted by Rule 32(c), Fed.R.Crim.P. Disclosure shall be made at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant. 18 U.S.C. 3552(d).

#### **§ 6A1.2. Position of Parties With Respect to Sentencing Factors**

(a) After receipt of the presentence report and within a reasonable time before sentencing, the attorney for the government and the attorney for the defendant, or the pro se defendant, shall each file with the court a written statement of the sentencing factors to be relied upon at sentencing. The parties are not precluded from asserting additional sentencing factors if notice of the intention to rely upon another factor is filed with the court within a reasonable time before sentencing.

(b) Copies of all sentencing statements filed with the court shall be contemporaneously served upon all other parties and submitted to the probation officer assigned to the case.

(c) In lieu of the written statement required by § 6A1.2(a), any party may file:

(1) A written statement adopting the findings of the presentence report;

(2) A written statement adopting such findings subject to certain exceptions or additions; or

(3) A written stipulation in which the parties agree to adopt the findings of the presentence report or to adopt such findings subject to certain exceptions or additions.

(d) A district court may, by local rule, identify categories of cases for which the parties are authorized to make oral statements at or before sentencing, in lieu of the written statement required by this section.

(e) Except to the extent that a party may be privileged not to disclose certain information, all statements filed with the court or made orally to the court pursuant to this section shall:

(1) Set forth, directly or by reference to the presentence report, the relevant facts and circumstances of the actual offense conduct and offender characteristics; and

(2) Not contain misleading facts.

#### **§ 6A1.3. Resolution of Disputed Factors**

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed.R.Crim.P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

#### COMMENTARY

Part A sets forth the procedures for establishing the facts upon which the sentence will be based. Reliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing.

§ 6A1.1. A thorough presentence investigation is essential in determining the facts relevant to sentencing. In order to ensure that the sentencing judge will have information sufficient to determine the appropriate sentence, Congress deleted provisions of Rule 32(c), Fed.R.Crim.P., which previously permitted the defendant to waive the presentence report. Rule 32(c)(1) permits the judge to dispense with a presentence report, but only after explaining, on the record, why sufficient information is already available.

§ 6A1.2. In order to focus the issues prior to sentencing, the parties are required to respond to the presentence report and to identify any issues in dispute. The potential complexity of factors important to the sentencing determination normally requires that the position of the parties be presented in writing. However, because courts differ greatly with respect to their reliance on written plea agreements and with respect to the feasibility of written statements under guidelines, district courts are encouraged to consider the approach that is most appropriate under local conditions. The Commission intends to reexamine this issue in light of experience under the guidelines.

§ 6A1.3. In current practice, factors relevant to sentencing are often determined in an informal fashion. The informality is to some extent explained by the fact that particular offense and offender characteristics rarely have a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See *United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. 3661. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." *United States v. Marshall*, 519 F.Supp. 751 (D.C. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983); *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." *United States v. Fatico*, 579 F.2d at 713. Unreliable allegations shall not be considered. *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971).

If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.

#### Part B—Plea Agreements

*Introduction.* Policy statements governing the acceptance of plea agreements under Rule 11(e)(1), Federal Rules of Criminal Procedure, are intended to ensure that plea negotiation practices:

- (1) Promote the statutory purposes of sentencing prescribed in 18 U.S.C. 3553(a); and
- (2) Do not perpetuate unwarranted sentencing disparity.

#### § 6B1.1. Plea Agreement Procedure

(a) If the parties have reached a plea agreement, the court shall, on the record, require disclosure of the agreement in open court or, on a showing of good cause, in camera. Rule 11(e)(2), Fed.R.Crim.P.

(b) If the plea agreement includes a nonbinding recommendation pursuant to Rule 11(e)(1)(B), the court shall advise the defendant that the court is not bound by the sentencing recommendation, and that the defendant has no right to withdraw the defendant's guilty plea if the court decides not to accept the sentencing recommendation set forth in the plea agreement.

(c) The court shall defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report, unless a report is not required under § 6A1.1.

#### § 6B1.2. Standards for Acceptance of Plea Agreements

(a) In the case of a plea agreement that includes the dismissal of any

charges or an agreement not to pursue potential charges [Rule 11(e)(1)(A)], the court may accept the agreement if the court determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing.

(b) In the case of a plea agreement that includes a nonbinding recommendation [Rule 11(e)(1)(B)], the court may accept the recommendation if the court is satisfied either that:

- (1) The recommended sentence is within the applicable guideline range; or
- (2) the recommended sentence departs from the applicable guideline range for justifiable reasons.

(c) In the case of a plea agreement that includes a specific sentence [Rule 11(e)(1)(C)], the court may accept the agreement if the court is satisfied either that:

- (1) the agreed sentence is within the applicable guideline range; or
- (2) the agreed sentence departs from the applicable guideline range for justifiable reasons.

#### § 6B1.3. Procedure Upon Rejection of a Plea Agreement

If a plea agreement pursuant to Rule 11(e)(1)(A) or Rule 11(e)(1)(C) is rejected, the court shall afford the defendant an opportunity to withdraw the defendant's guilty plea. Rule 11(e)(4), Fed.R.Crim.P.

#### § 6B1.4. Stipulations

(a) A plea agreement may be accompanied by a written stipulation of facts relevant to sentencing. Except to the extent that a party may be privileged not to disclose certain information, stipulations shall:

- (1) Set forth the relevant facts and circumstances of the actual offense conduct and offender characteristics;
- (2) Not contain misleading facts; and
- (3) Set forth with meaningful specificity the reasons why the sentencing range resulting from the proposed agreement is appropriate.

(b) To the extent that the parties disagree about any facts relevant to sentencing, the stipulation shall identify the facts that are in dispute.

(c) A district court may, by local rule, identify categories of cases for which the parties are authorized to make the required stipulation orally, on the record, at the time the plea agreement is offered.

(d) The court is not bound by the stipulation, but may with the aid of the

presentence report, determine the facts relevant to sentencing.

#### COMMENTARY

These policy statements are a first step toward implementing 28 U.S.C. 994(a)(2)(E). Congress indicated that it expects judges "to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S. REP. 98-225, 98th Cong., 1st Sess. 63,167 (1983). In pursuit of this goal, the Commission shall study plea agreement practice under the guidelines and ultimately develop standards for judges to use in determining whether to accept plea agreements. Because of the difficulty in anticipating problems in this area, and because the sentencing guidelines are themselves to some degree experimental, substantive restrictions on judicial discretion would be premature at this stage of the Commission's work.

The present policy statements move in the desired direction in two ways. First, the policy statements make clear that sentencing is a judicial function and that the appropriate sentence in a guilty plea case is to be determined by the judge. This is a reaffirmation of current practice. Second, the policy statements ensure that the basis for any judicial decision to depart from the guidelines will be explained on the record. Explanations will be carefully analyzed by the Commission and will pave the way for more detailed policy statements presenting substantive criteria to achieve consistency in this aspect of the sentencing process.

§ 6B1.1. This provision parallels the procedural requirements of Rule 11(e), Fed.R.Crim.P. Plea agreements must be fully disclosed and a defendant whose plea agreement includes a nonbinding recommendation must be advised that the court's refusal to accept the sentencing recommendation will not entitle the defendant to withdraw the plea.

Section 6B1.1(c) deals with the timing of the court's decision whether to accept the plea agreement. Rule 11(e)(2) gives the court discretion to accept the plea agreement immediately or defer acceptance pending consideration of the presentence report. Prior to the guidelines, an immediate decision was permissible because, under Rule 32(c), Fed.R.Crim.P., the defendant could waive preparation of the presentence report. Section 6B1.1(c) reflects the changes in practice required by § 6A1.1 and amended Rule 32(c)(1). Since a presentence report normally will be prepared, the court must defer acceptance of the plea agreement until the court has had an opportunity to consider the presentence report.

§ 6B1.2. This section makes clear that a court may accept a plea agreement provided that the judge complies with the obligations imposed by Rule 11(e), Fed.R.Crim.P. A judge may accept an agreement calling for dismissal of charges or an agreement not to pursue potential charges if the remaining charges reflect the seriousness of the actual offense behavior. This requirement does not authorize judges to intrude upon the charging discretion of the prosecutor. If the government's motion to dismiss charges or

statement that potential charges will not be pursued is not contingent on the disposition of the remaining charges, the judge should defer to the government's position except under extraordinary circumstances. Rule 48(a), Fed.R.Crim.P. However, when the dismissal of charges or agreement not to pursue potential charges is contingent on acceptance of a plea agreement, the court's authority to adjudicate guilt and impose sentence is implicated, and the court may determine whether or not dismissal of charges will undermine the sentencing guidelines.

Similarly, the court will accept a recommended sentence or a plea agreement requiring imposition of a specific sentence only if the court is satisfied either that the contemplated sentence is within the guidelines or, if not, that the recommended sentence or agreement departs from the applicable guideline range for justifiable reasons and does not undermine the basic purposes of sentencing.

§ 6B1.3. This provision implements the requirements of Rule 11(e)(4). It assures the defendant an opportunity to withdraw the defendant's plea when the court has rejected a plea agreement that would require dismissal of charges or imposition of a specific sentence.

§ 6B1.4. This provision requires that when a plea agreement includes a stipulation of fact, the stipulation must fully and accurately disclose all factors relevant to the determination of sentence. This provision does not obligate the parties to reach agreement on issues that remain in dispute or to present the court with an appearance of agreement in areas where agreement does not exist. Rather, the overriding principle is full disclosure of the circumstances of the actual offense and the agreement of the parties. The stipulation should identify all areas of agreement, disagreement and uncertainty that may be relevant to the determination of sentence. Similarly, it is not appropriate for the parties to stipulate to misleading or non-existent facts, even when both parties are willing to assume the existence of such "facts" for purposes of the litigation. Rather, the parties should fully disclose the actual facts and then explain to the court the reasons why the disposition of the case should differ from that which such facts ordinarily would require under the guidelines.

Because of the importance of the stipulations and the potential complexity of the factors that can affect the determination of sentences, stipulations ordinarily should be in writing. However, exceptions to this practice may be allowed by local rule. The Commission intends to give particular attention to this aspect of plea agreement procedure as experience under the guidelines develops. See Commentary to § 6A1.2.

Section 6B1.4(d) makes clear that the court is not obliged to accept the stipulation of the parties. Even though stipulations are expected to be accurate and complete, the court cannot rely exclusively upon stipulations in ascertaining the factors relevant to determination of the sentence. Rather, in determining the factual basis for the sentence, the court will consider the

stipulation, together with the results of the presentence investigation, and any other relevant information.

#### CHAPTER SEVEN—VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

##### § 7A1.1. Classes of Violations

(a) Class I: Violations of any condition of probation or supervised release that constitutes new criminal conduct (except as noted in (c) below);

(b) Class II: Violations of any special condition of probation or supervised release;

(c) Class III: Violations of any standard condition of probation or supervised release and new criminal conduct consisting of misdemeanors or petty offenses otherwise excludable pursuant to § 4A1.2(c) (1) and (2) (Definitions and Instructions for Computing Criminal History).

##### § 7A1.2. Reporting Violations

(a) Classes I and II: The United States Probation Officer shall report to the court all included violations of probation or supervised release;

(b) Class III: The United States Probation Officer shall report to the court all included violations of probation or supervised release unless he determines that non-reporting:

(1) Will not present an undue risk to the public;

(2) Will not depreciate either the defendant's or the public's respect for the justice system;

(3) Is consistent with the sentencing court's intention for placing the defendant on supervision; and

(4) Is otherwise appropriate considering the purposes of sentencing, the nature and circumstances of the violation and the criminal history and other characteristics of the defendant.

##### § 7A1.3. Warrants and Violation Hearings

(a) Class I: The court shall issue a violator's warrant and conduct a violation hearing in accordance with Rule 32.1, Federal Rules of Criminal Procedure, for all included violations of probation or supervised release;

(b) Classes II and III: The court shall assess the purposes of sentencing, the nature and circumstances of the violations, and the criminal history and other characteristics of the defendant in determining whether to issue a violator's warrant and conduct a violation hearing in accordance with Rule 32.1, Federal Rules of Criminal Procedure, for all included violations of probation and supervised release.

### § 7A1.4. Sanctions Imposable for Violations

#### (a) Violations of Probation

##### (1) Class I.

(A) If the new criminal conduct involves a crime of violence, trafficking in a controlled substance, or conduct similar to the original offense of conviction, upon a finding that a violation has occurred, the court shall revoke probation and impose a new sentence within the guideline range that is 3 offense levels above the range that was determined when the defendant was sentenced to the term of probation.

(B) If the new criminal conduct involves any crime other than those listed in paragraph (A) above, upon a finding that a violation has occurred, the court shall revoke probation and impose a new sentence within the guideline range that is 2 offense levels above the range that was determined when the defendant was sentenced to the term of probation.

(C) If the new criminal conduct involves only the use of a controlled substance, upon a finding that a violation has occurred, the court either shall:

(1) Revoke probation and impose a new sentence pursuant to paragraph (B) above, or

(2) Continue or extend the term of probation and modify the conditions to include the defendant's participation in an approved drug treatment program.

##### (2) Classes II and III.

(A) Upon a finding that a violation has occurred, the court either shall:

(1) Revoke probation and impose any other sentence available within the guideline range that was determined when the defendant was sentenced to the term of probation, or

(2) Continue or extend the term of probation and modify the conditions to afford more intensive supervision.

##### (b) Violations of Supervised Release.

##### (1) Class I.

(A) If the new criminal conduct involves a crime of violence, trafficking in a controlled substance, or conduct similar to the original offense of conviction, upon a finding that a violation has occurred, the court shall revoke the supervised release and impose a new sentence of incarceration according to the following schedule:

Original term of supervised release	Incarceration (months)
3 or more years .....	18-24
More than 1 but less than 3 years .....	12-18
1 year or less .....	6-12

Additionally, the court shall include a

length equal to the original term of supervised release minus any term of incarceration imposed for the revocation.

(B) If the new criminal conduct involves any crime other than those listed in paragraph (A) above, upon a finding that a violation has occurred, the court shall revoke the supervised release and impose a new sentence of incarceration according to the following schedule:

Original term of supervised release	Incarceration (months)
3 or more years .....	12-18
More than 1 but less than 3 years .....	6-12
1 year or less .....	3-6

Additionally, the court shall include a new term of supervised release of a length equal to the original term of supervised release minus any term of incarceration imposed for the revocation.

(C) If the new criminal conduct involves only the use of a controlled substance, upon a finding that a violation has occurred, the court either shall:

(1) Revoke supervised release and impose a new sentence pursuant to paragraph (B) above, or

(2) Continue or extend the term of supervised release and modify the conditions to include the defendant's participation in an approved drug treatment program.

##### (2) Classes II and III.

(A) Upon a finding that a violation has occurred, the court either shall:

(1) Revoke supervised release and impose a new sentence of incarceration of not less than three but not more than nine months and a new term of supervised release of a length equal to the original term of supervised release minus any term of incarceration imposed for the revocation, or

(2) Continue or extend the term of supervised release and modify the conditions to afford more intensive supervision.

##### (c) Violations Generally:

(1) Upon revocation, the court shall give no credit for time served under probation or supervised release imposed for the original sentence nor shall it give credit for any time served under probation or supervised release in intermittent or community confinement or home detention imposed for the original sentence.

(2) If the defendant is serving a period of custody whether or not that custody is related to the same conduct that is the basis for the violation of probation or supervised release, the court shall order

that the incarceration imposed upon revocation run consecutively to that period of custody.

### COMMENTARY

Regardless of the purposes for which a term of probation or supervised release is imposed, compliance with the imposed conditions of supervision is essential to effectuate those purposes. Only if an offender understands that failure to comply will result in a prompt and certain response from the court will the conditions be adhered to in a meaningful and conscientious manner. The drafters of the Comprehensive Crime Control Act, recognizing that consistency and certainty are necessary in sanctioning violations of such conditions, directed the Commission to develop guidelines and policy statements regarding the revocation of both probation and supervised release. 28 U.S.C. 994(a)(3).

To facilitate that directive, the guidelines divide violations of probation and supervised release into three distinct classes. § 7A1.1. Class I violations include any conduct that consists of new criminal behavior, excluding those misdemeanors and petty offenses addressed in § 4A1.2(c) (1) and (2) (Definitions and Instructions for Computing Criminal History). Class II includes violations of the special conditions of probation or supervised release set forth in § 5B1.4(b) ((Recommended Conditions of Probation and Supervised Release) (Policy Statement)). Class III includes violations of the standard conditions set forth in § 5B1.4(a) ((Recommended Conditions of Probation and Supervised Release) (Policy Statement)). Additionally, those misdemeanors and petty offenses otherwise excludable pursuant to § 4A1.2(c) (1) and (2) are to be considered Class III violations. The remaining sections of this chapter contain guidelines geared toward these three classes of violations.

Section 7A1.2 provides guidelines for the reporting of violations of the conditions of probation and supervised release. All Class I and II violations are to be reported to the court by the United States Probation Officer. All Class III violations are to be reported unless the probation officer determines that the four factors noted in § 7A1.2(b) dictate otherwise. The Commission realizes that it might be counterproductive to have the courts and probation service burdened with reporting every incident of non-compliance with the standard conditions. While the development of uniform compliance standards for these conditions is an advisable alternative in this regard, that task must be placed on a future Commission agenda. In the interim, individual courts may wish to develop such compliance standards as models for subsequent adoption by the Commission. Probation officers should continue to document all violations in the chronological record in the case file and report to the court those particularly serious, repetitious or flagrant violations of the standard conditions.

Section 7A1.3 provides the guidelines for the court's issuance of a violator's warrant (or summons) and for when it should conduct a violation hearing pursuant to that warrant.

While a warrant is to be issued and a hearing conducted for all Class I violations of probation and supervised release, the court has discretion in regard to Class II and III violations. The Commission plans to revisit this issue. Detailed guidance might be included in the compliance standards alluded to above.

The guidelines for the sanctions imposable for violations of the conditions of supervision are included in § 7A1.4. Separate subsections are provided for probation and supervised release and three categories of Class I violations are contained within each of these subsections.

If the violation of the probation condition includes new criminal conduct involving a crime of violence, trafficking in a controlled substance or conduct similar to the original offense of conviction, the court shall revoke probation and impose a new sentence 3 offense levels above the range determined for the original offense. If the new criminal conduct involves any other Class I crime, the court shall revoke probation and impose a new sentence 2 offense levels above the range determined for the original offense. Except as provided in § 7A1.4(a)(1)(C), a determination not to revoke probation for a Class I crime constitutes a departure from the guidelines. In those circumstances where the court concludes that revocation is not appropriate, the court should extend the term of probation and modify the conditions to afford more intensive supervision.

While use or possession of a controlled substance constitutes a violation of one of the standard conditions (Class III), such a violation also constitutes new criminal conduct (Class I). Section 7A1.4(a)(1)(C) affords the court discretion as to how to proceed. When the court determines, for instance, that the defendant's drug possession was for personal use only and no new criminal charges have resulted, the court may choose to continue the defendant on probation in an approved drug treatment program. If, however, there is continued drug use after placement in a treatment program or if it appears that the defendant's drug use is associated with other criminal activity, the court may revoke probation and impose a new sentence 2 offense levels above the range determined for the original offense.

The guidelines provide the court with discretion as to how to sanction Class II and III violations of probation. Compliance standards to be developed should address the various special and standard conditions of supervision and provide more specific guidance as to the appropriate response for their violation.

Upon revocation of probation, the new sentence to be imposed relates to the sentencing range originally determined for the defendant. If the original offense level was decreased for acceptance of responsibility, for example, the resulting range would still govern the revocation term determination despite the fact that the defendant might have later failed to demonstrate such acceptance (e.g., failure to pay restitution to a victim). Additionally, the criminal history score originally computed for the defendant would remain unchanged for purposes of sentencing on revocation. In

those instances, however, where the defendant was placed on probation because of the court's departure from an otherwise applicable guideline range, the sentence imposed upon revocation is to be determined in relation to the normally applicable guideline range and not to the range chosen for the departure.

For Class I violations of supervised release, three categories of sanctions are provided mirroring those for probation. A schedule is included for both Class I (A) and (B) type violations. The guidelines for new criminal conduct that involve only the personal use of a controlled substance affords the court with an option as to how to proceed. Additionally, upon revocation of a term of supervised release, the court shall impose a new term of supervision to commence upon release from the re-incarceration. The length of this new period of supervised release is equal to the original term minus any term of incarceration imposed by the court for the revocation. For example, if the defendant was serving a three-year period of supervised release and the court imposed a sixteen-month term of incarceration for a Class I violation, the new term of supervised release would be twenty months.

For Class II and III violations of supervised release, the court has discretion either to revoke and impose a new term of incarceration and a new term of supervised release or to modify both the term and conditions of the previously ordered supervised release.

Section 7A1.4(c) contains some general provisions for sanctioning violations of probation and supervised release. In determining the new sentence, the court shall give no credit for time served under supervision or time served under one of the incarceration alternatives available pursuant to § 5C2.1 (Imposition of a Term of Imprisonment). If the defendant is serving a period of custody related to the same conduct that formed the basis for the revocation, the new sentence imposed upon revocation shall run consecutively to that period of custody.

The guidelines herein have been developed to address the initial instances of violation behavior meriting court intervention. While the Commission recognizes that defendants often repeat violations after re-release from incarceration, guidelines for such behavior must also await further Commission action. This is a subject that could be included in the compliance standards that courts may be developing in the interim.

#### Technical, Conforming, and Clarifying Amendments to Initial Sentencing Guidelines

Pursuant to Section 994(p) of Title 28, United States Code, the United States Sentencing Commission reports to the Congress the following technical, conforming, and clarifying amendments to the initial sentencing guidelines which were submitted to the Congress on April 13, 1987, pursuant to Section 235(a)(1) of the Comprehensive Crime Control Act of 1984:

#### Amendments to Chapter One

1. Amend the chapter heading to read "Chapter One—Introduction and General Application Principles".

2. Following the chapter heading, insert "Part A—Introduction".

3. In the first paragraph following the heading "The Statutory Mission", strike the word "by" and insert in lieu thereof ", i.e.,".

4. In the first paragraph following the heading "Multi-Count Convictions", strike "an" the second time it appears and insert in lieu thereof "a".

5. Amend the second paragraph following the heading "Sentencing Ranges"—

(a) By striking "insofar as many" and inserting in lieu thereof "inasmuch as those"; and

(b) By striking "so the guidelines also provide potential discounts for" and inserting in lieu thereof "the guidelines also permit the court to impose lesser sentences on".

6. Amend the third paragraph following the heading "Sentencing Ranges" by inserting before the period at the end of said paragraph the words "over a period of ten years".

7. Preceding subpart 6 (Application Instructions), insert "Part B—General Application Principles".

8. Redesignate the numeral 6 preceding "Application Instructions" as § 1B1.1.

9. Strike the first two paragraphs following the heading "Application Instructions".

10. In the subpart titled "Application Instructions", redesignate paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 as subsections (a), (b), (c), (d), (e), (f), (g), (h), and (i), respectively, and strike the period after each numeral.

11. In the subpart titled "Application Instructions", amend the first numbered paragraph, redesignated as subsection (a), to read:

"(a) Determine the guideline section in Chapter Two most applicable to the statute of conviction. See § 1B1.2 (Applicable Guidelines). The statutory index (Appendix A) provides a listing to assist in this determination. If more than one guideline is referenced for the particular statute, select the guideline most appropriate for the conduct of which the defendant was convicted."

12. In the subpart titled "Application Instructions", amend the second numbered paragraph, redesignated as subsection (b), by—

(a) Striking the word "Apply" and inserting in lieu thereof "Determine"; and

(b) Inserting the word "apply" following the word "and".

13. In the subpart titled "Application Instructions", amend the sixth numbered paragraph, redesignated as subsection (f), to read:

"(f) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments."

14. In the subpart titled "Application Instructions", amend the seventh numbered paragraph, redesignated as subsection (g), to read:

"(g) Determine the guideline range in Part A of Chapter Five that corresponds to the total offense level and criminal history category."

#### *Amendments to Chapter Two*

1. Strike the chapter title and all that follows through the heading "General Principles Governing Chapter Two".

2. Amend § 201 (Applicable Guidelines)—

(a) By redesignating § 201 as § 1B1.2;

(b) In subsection (a) by—

(1) Striking all after the word "apply" the first time such word appears in that subsection through the word "chapter" the first time such word appears and inserting in lieu thereof "the guideline in Chapter Two (Offense Conduct)"; and

(2) Striking the word "this" the last time it appears in such subsection and inserting in lieu thereof "such"; and

(c) In subsection (b) by redesignating § 202, Relevant Conduct, as § 1B1.3 (Relevant Conduct).

3. Amend the first paragraph of commentary to § 201 (redesignated as § 1B1.2)—

(a) By striking "Section 201" and inserting in lieu thereof "§ 1B1.2. This section"; and

(b) By striking "this chapter" and inserting in lieu thereof "Chapter Two (Offense Conduct)".

4. Amend the second paragraph of commentary to § 201 (redesignated as § 1B1.2), by—

(a) Striking the word "crime" wherever it appears and inserting in lieu thereof "offense or offenses"; and

(b) Inserting at the end of the paragraph the following:

"Similarly, if the defendant pleads guilty to one robbery but admits the elements of two additional robberies as part of a plea agreement, the guideline applicable to three robberies is to be applied."

5. In the second paragraph of commentary to § 201 (redesignated as § 1B1.2), strike all after the comma following the word "Five" through the word "Sentences" and insert in lieu thereof "Part G (Implementing the Total Sentence of Imprisonment)".

6. Amend the fifth paragraph of commentary to § 201 (redesignated as § 1B1.2)—

(a) By redesignating 201(b) as 1B1.2(b);

(b) By redesignating § 201(a) as

§ 1B1.2(a); and

(c) By redesignating § 202 as § 1B1.3.

7. In the guideline section titled "Relevant Conduct", redesignate § 202 as § 1B1.3.

8. Strike the first paragraph of commentary to § 202 (redesignated as § 1B1.3), and insert in lieu thereof "A judge should consider all relevant offense and offender characteristics. Conduct and circumstances of the offense of conviction are restricted to:".

9. In the second paragraph of commentary to § 202 (redesignated as § 1B1.3), insert "and Criminal Livelihood" after the word "History".

10. In the second paragraph of commentary to § 202 (redesignated as § 1B1.3), strike "K (Departures)" and insert in lieu thereof "H (Specific Offender Characteristics)".

11. Amend § 203—

(a) By redesignating such guideline as § 1B1.4;

(b) In the text following the guideline section title, by striking "prescribed by this chapter";

(c) In subsection (a) by inserting before the semicolon: "from Chapter Two";

(d) In subsection (b) by inserting "from Chapter Two" immediately following the word "characteristics";

(e) In subsection (c) by striking "Part A (Victim-Related Adjustments)";

(f) In subsection (d) by striking all after the word "Chapter" through the semicolon and inserting in lieu thereof "Four, Part B (Career Offenders and Criminal Livelihood)"; and

(g) By striking subsection (e).

12. Strike the second paragraph of commentary to § 203 (redesignated as § 1B1.4), and insert in lieu thereof the following:

"The adjustments in Chapter Three that may apply include Part A (Victim-Related Adjustments), Part B (Role in the Offense), Part C (Obstruction), Part D (Multiple Counts), and Part E (Acceptance of Responsibility). Chapter Four, Part B (Career Offenders and Criminal Livelihood), if applicable, is also to be treated as an adjustment to the offense level."

13. Following the commentary to § 203 (redesignated as § 1B1.4), add a new guideline section and commentary as follows:

"§ 1B1.5. Interpretation of References to Other Offense Guidelines.

Unless otherwise expressly indicated, a reference to another guideline, or an instruction to apply another guideline, refers to the entire guideline, i.e., the base offense

level plus all applicable adjustments for specific offense characteristics.

#### **COMMENTARY**

References to other offense guidelines are most frequently designated "Cross References," but may also appear in the portions of the guideline entitled "Base Offense Level" (e.g., §§ 2D1.2(a)(1), 2H1.2(a)(2)), or "Specific Offense Characteristics" (e.g., §§ 2A4.1(b)(5)(B), 2Q1.2(b)(5)). These references may be to a specific guideline, or may be more general (e.g., to the guideline for the "underlying offense"). Such references are to be construed to incorporate the specific offense characteristics as well as the base offense level. For example, if the guideline reads "2 plus the offense level from § 2A2.2 (Aggravated Assault)," the user would determine the offense level from § 2A2.2, including any applicable adjustments for planning, weapon use, degree of injury and motive, and then increase by 2 levels. If the victim was vulnerable, the adjustment from § 3A1.1 (Vulnerable Victim) also would apply."

14. Before the heading "Structure of the Guidelines" insert "§ 1B1.6" and strike the colon following the heading.

15. Amend the text and illustration following the heading "Structure of the Guidelines"—

(a) In the first paragraph by striking the word "sections" and inserting in lieu thereof "subparts";

(b) In the first and second paragraphs by striking the word "section" wherever that word appears except where such word appears as the first word of the second sentence of the second paragraph, and inserting in lieu thereof "subpart"; and

(c) In the illustration by striking "Section" and inserting in lieu thereof "Subpart".

16. Strike the paragraph of text following the illustration of guidelines structure and insert in lieu thereof the following:

"§ 1B1.7. Significance of Commentary.

The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. See 18 U.S.C. 3742. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines."

17. Following the chapter two title and preceding Part A, insert the following:

#### "OVERVIEW"

Chapter Two pertains to offense conduct. The chapter is organized by offenses and divided into parts and related sections that may cover one statute or many. Each offense has a corresponding base offense level. When a particular offense warrants a more individualized sentence, specific offense characteristics are provided within the guidelines. Certain factors relevant to criminal conduct that are not provided in specific guidelines are set forth in Chapter Three, Part A (Victim-Related Adjustments) and Chapter Five, Part K (Departures). The statutes appearing at the beginning of each part are illustrative and do not necessarily include all the statutes covered by the guidelines in that part."

18. In the commentary to § 2A1.4, strike the word "intoxicated" and insert in lieu thereof "under the influence of alcohol or drugs".

19. Amend § 2A3.4(b)(1) by inserting after "§ 2241" and before the comma the following: "(including, but not limited to, the use or display of any dangerous weapon)".

20. In the commentary to § 2A3.4, strike "provided through" and insert in lieu thereof "consistent with the".

21. Amend § 2A4.1(b)(4) by striking "voluntarily" wherever it appears.

22. Amend the commentary to § 2A4.1 by—

(a) Striking the last sentence in the first paragraph; and

(b) By inserting immediately following the first paragraph the following new paragraph:

"The guideline contains an adjustment for the length of time that the victim was detained. The adjustment recognizes the increased suffering involved in lengthy kidnappings, and provides an incentive to release the victim. A victim who is freed should be deemed to have been released unless the defendant attempted to recapture the victim or the victim was rescued by law enforcement authorities whom the defendant resisted."

23. Amend § 2B3.1(b)(2)(C) by inserting "brandished, displayed or" immediately before the word "possessed".

24. Amend the first paragraph of commentary to § 2B3.2 by striking "873,".

25. Amend § 2B3.2(b)(2)(C) by inserting "brandished, displayed or" immediately before the word "possessed".

26. In the first paragraph of commentary to § 2B4.1—

(a) Strike "224, and 1954" and insert in lieu thereof: "and 224"; and

(b) Strike "41 U.S.C. 51-54" and insert in lieu thereof: "41 U.S.C. 51, 53-54".

27. In the fourth paragraph of commentary to § 2B4.1, strike "41 U.S.C. 51-54" and insert in lieu thereof: "41 U.S.C. 51, 53-54".

28. In subparts B5 and B6, insert "(Fraud and Deceit)" immediately following "§ 2F1.1" wherever it appears.

29. Amend the second paragraph of commentary to § 2B6.1 by inserting "(Larceny, Embezzlement, and Other Forms of Theft)" immediately following "§ 2B1.1".

30. Amend § 2C1.1(b) by striking "(1)" preceding the word "Apply" and by redesignating subparagraphs (A) and (B) as (1) and (2), respectively.

31. Amend § 2C1.6(a) by striking "8" and inserting in lieu thereof "7".

32. Amend the last sentence of the fourth paragraph of the commentary to § 2C1.1 by striking the word "police", and inserting in lieu thereof "law enforcement".

33. Amend the Drug Quantity Table by striking the word "Propanamide" wherever that word appears and inserting in lieu thereof "Fentanyl".

34. Amend the Drug Quantity Table—  
(a) In the first paragraph (i.e., the text corresponding to Level 36), by striking all following the word "Analogue" and inserting in lieu thereof: "10,000 KG Marihuana, 100,000 Marihuana Plants, 2000 KG Hashish, 200 KG Hashish Oil (or more of any of the above)";

(b) By adding at the end of the second paragraph (i.e., the text corresponding to Level 34) "10,000-99,999 Marihuana Plants, 600-1999 KG Hashish, 60-199 KG Hashish Oil";

(c) By adding at the end of the third paragraph (i.e., the text corresponding to Level 32) "10,000-29,999 Marihuana Plants, 200-599 KG Hashish, 20-59.9 KG Hashish Oil";

(d) By adding at the end of the fourth paragraph (i.e., the text corresponding to Level 30) "7,000-9999 Marihuana Plants, 140-199 KG Hashish, 14-19.9 KG Hashish Oil";

(e) By adding at the end of the fifth paragraph (i.e., the text corresponding to Level 28) "4,000-6999 Marihuana Plants, 80-139 KG Hashish, 8.0-13.9 KG Hashish Oil";

(f) By adding at the end of the sixth paragraph (i.e., the text corresponding to Level 26) "1,000-3999 Marihuana Plants, 20-79 KG Hashish, 2.0-7.9 KG Hashish Oil";

(g) By adding at the end of the seventh paragraph (i.e., the text corresponding to Level 24) "800-999 Marihuana Plants, 16-19.9 KG Hashish, 1.6-1.9 KG Hashish Oil"; and

(h) In the eighth paragraph (i.e., the text corresponding to Level 22), by striking all after "600" the second time such number appears and inserting in

lieu thereof: "799 Marihuana Plants, 12-15.9 KG Hashish, 1.2-1.5 KG Hashish Oil".

35. Amend the last sentence of the first paragraph of commentary to § 2D1.1 by striking "960(b)" and inserting in lieu thereof "962(b)".

36. Amend the last sentence of the third paragraph of commentary to § 2D1.1 by striking "Force" and inserting in lieu thereof "Forces".

37. Amend the first sentence of the fourth paragraph of commentary to § 2D1.1 by inserting the word "two" between the words "with" and "asterisks".

38. Strike the last three paragraphs of commentary to § 2D1.1 preceding the Drug Equivalency Table, and insert in lieu thereof the following:

"The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, LSD and marihuana. The Drug Equivalency Tables set forth below provide conversion factors for other substances, which the Drug Quantity Table refers to as "equivalents" of these drugs. For example, 1 gram of a substance containing methamphetamine, a Schedule I stimulant, is to be treated as the equivalent of 2 grams of a substance containing cocaine in applying the Drug Quantity Table.

The Drug Equivalency Tables also provide a means for combining differing controlled substances to obtain a single offense level. If all the drugs are "equivalents" of the same drug, e.g., stimulants that are grouped with cocaine, convert them to that drug. In other cases, convert each of the drugs to either the heroin or marihuana equivalents, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level. Use the marihuana equivalents when the only substances involved are "Schedule I Marihuana," "Schedule III Substances," "Schedule IV Substances," "Schedule V Substances" or "Other Schedule I or II Substances".

Note: Because of the statutory equivalences, the entries in the Drug Equivalency Tables do not necessarily correspond to the relative dosages of the drugs involved. Examples:

1. The defendant is convicted of selling 70 grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). Both PCP and LSD are grouped together in the Drug Equivalency Tables under the heading "LSD, PCP and Other Schedule I and II Hallucinogens," which provides PCP equivalencies. The 250 milligrams of LSD is equivalent to 25 grams of PCP. The total is therefore 95 grams of PCP, for which the Drug Quantity Table provides an offense level of 24.

2. The defendant is convicted of selling 500 grams of marihuana (Level 8) and 5 kilograms of diazepam (Level 8). The diazepam, a Schedule IV drug, is equivalent to 825 grams

of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 10 in the Drug Quantity Table.

3. The defendant is convicted of selling 80 grams of cocaine (Level 16) and 5 kilograms of marihuana (Level 14). The cocaine is equivalent to 16 grams of heroin; the marihuana, to 5 grams of heroin. The total equivalent is 21 grams of heroin, which has an offense level of 18 in the Drug Quantity Table."

### 39. Amend the Drug Equivalency Table:

(a) In the title by striking "Table" and inserting in lieu thereof "Tables";

(b) By amending the title of the first section to read: "Schedule I or II Opiates";

(c) In the second row of the first section by striking "0.66" and inserting in lieu thereof "0.67";

(d) In the fifth and sixth rows of the first section, by striking "5" and inserting in lieu thereof "0.7";

(e) By striking the title to the second section (i.e., striking "Schedule II Substances with Heroin Like Effects"), and by inserting after the word "Fentanyl" (in the eighth row of the re-named section "Schedule I or II Opiates") the organic chemical name "(N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide)";

(f) In the fifteenth row (of the re-named section "Schedule I or II Opiates") by striking "1 gm of heroin" and inserting in lieu thereof "0.5 gm of heroin";

(g) In the seventeenth row (of the re-named section "Schedule I or II Opiates") by striking "1.66" and inserting in lieu thereof "0.8";

(h) By inserting after the seventeenth row (of the re-named section "Schedule I or II opiates") the following:

"1 gm of Codeine = 0.08 gm of heroin  
1 gm of Dextropropoxyphene/  
Propoxyphene-Bulk = 0.05 gm of heroin

1 gm of Ethylmorphine = 0.165 gm of heroin

1 gm of Hydrocodone/  
Dihydrocodeinone = 0.5 gm of heroin

1 gm of Mixed Alkaloids of Opium/  
Papaveretum = 0.25 gm of heroin

1 gm of Opium = 0.05 gm of heroin";

(i) In the second row of the section titled "Cocaine and Other Schedule I and II Stimulants", by inserting in the right-hand column "0.4 gm of cocaine/" preceding "0.08 gm of heroin";

(j) In the third row of the section titled "Cocaine and Other Schedule I and II Stimulants" by inserting "0.2 gm of cocaine/" preceding "0.04";

(k) In the fourth and fifth rows of the section titled "Cocaine and Other Schedule I and II Stimulants" by

inserting "1.0 gm of cocaine/" preceding "0.2";

(l) In the sixth row of the section titled "Cocaine and Other Schedule I and II Stimulants" by inserting "2.0 gm of cocaine/" preceding "0.4";

(m) In the seventh row of the section titled "Cocaine and Other Schedule I and II Stimulants" by inserting "0.2 gm of cocaine/" preceding "0.04";

(n) In the eighth row of the section titled "Cocaine and Other Schedule I and II Stimulants" by inserting "0.4 gm of cocaine/" preceding "0.08";

(o) In the ninth row of the section titled "Cocaine and Other Schedule I and II Stimulants" by inserting "0.375 gm of cocaine/" preceding "0.075"; and

(p) In the tenth row of the section titled "Cocaine and Other Schedule I and II Stimulants" by striking "0.166 gm of heroin" and inserting in lieu thereof "0.833 gm of cocaine/0.167 gm of heroin".

40. Amend the Drug Equivalency Table in the section titled "LSD, PCP and Other Schedule I or II Hallucinogens"—

(a) By inserting "or PCP" following the word "heroin" in each row except for the tenth row; and

(b) In the eighteenth row by striking "1.66" and inserting in lieu thereof "1.67".

41. Amend the Drug Equivalency Table in the section titled "Schedule I Marihuana" by striking "Hash/" in the fourth row.

42. Amend the Drug Equivalency Table—

(a) By striking the section title "Schedule I or II Depressants and Schedule II Narcotics" and inserting in lieu thereof: "Other Schedule I or II Substances"; and

(b) By striking the first 12 rows in such section.

43. Amend the Drug Equivalency Title in the section titled "Schedule III Substances"—

(a) In the ninth row of such section, by striking "0.4 mg of heroin/400 mg of marihuana" and inserting in lieu thereof "2 mg of heroin/2 gm of marihuana"; and

(b) In the last two rows of such section, by striking "0.01 mg of heroin/10 mg of marihuana" and inserting in lieu thereof "2 mg of heroin/2 gm of marijuana" in each row.

44. Amend the Drug Equivalency Table in the section titled "Schedule IV and V Substances"—

(a) By amending the section title to read "Schedule IV Substances";

(b) By striking the third row of such section; and

(c) By amending the right-hand column of each remaining row in that

section to read "0.125 mg of heroin/0.125 gm of marihuana".

45. Amend the Drug Equivalency Table by inserting at the end (following the section retitled as "Schedule IV Substances") a new section as follows:

"Schedule V Substances

1 gm of codeine cough syrup = 0.0125 mg of heroin/12.5 mg of marihuana".

46. Amend the Dosage Equivalency Table under the subtitle "Stimulants"—

(a) By striking "HCL" and inserting in lieu thereof "HCl";

(b) By striking "SO4" and inserting in lieu thereof "SO<sub>4</sub>".

47. Amend § 2D1.5(a)(3) by striking "300 times that specified in Row 1 of the Drug Quantity Table" and inserting in lieu thereof: "30 times the minimum in the first paragraph (i.e., the text corresponding to Level 36) of the Drug Quantity Table or 300 times the minimum in the third paragraph (i.e., the text corresponding to Level 32)".

48. Amend § 2E2.1(b)(1)(C) by inserting "brandished, displayed or" immediately before the word "possessed".

49. Amend § 2F1.2(b)(1) by striking "defendant's conduct" and inserting in lieu thereof "offense".

50. Strike the thirteenth paragraph of commentary to § 2F1.1 and insert in lieu thereof the following:

"If the fraud exploited vulnerable victims, an enhancement will apply. See § 3A1.1 (Vulnerable Victim)."

51. Amend the last sentence of the commentary to § 2F1.2 by striking all after "realized" and inserting in lieu thereof "through trading in securities based upon such information, by the defendant and persons acting in concert with him or to whom he provided inside information, is employed instead of the victims' losses."

52. Strike "2 U.S.C. § 437(g)(d)," from the commentary to § 2H2.1.

53. In the commentary to § 2H2.1, strike "1341, and 1343,".

54. Amend § 2J1.7(b) by striking "underlying offense" each place it appears and inserting in lieu thereof "offense committed while on release".

55. Amend § 2J1.8(c) by redesignating "Note:" as "Cross Reference".

56. Strike the commentary to § 2J1.7 and insert in lieu thereof the following:

"§ 2J1.7 (18 U.S.C. 3147). The statute specifies that "any term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment." Because a defendant convicted under this section necessarily will have a prior criminal record, the guideline sentences are higher than otherwise might appear. This guideline presumes, however,

that the sentence imposed for the offense committed while on release, which may have been imposed by a state court, is reasonably consistent in effective length with the sentence that these guidelines require for a similar federal offense. If not, departure may be warranted."

57. Amend § 2K1.3(b) by striking "(1)" immediately preceding "If" and redesignating subparagraphs (A), (B), (C), (D), and (E) as paragraphs (1), (2), (3), (4), and (5), respectively.

58. Amend § 2K1.4(b) by striking "(1)" immediately preceding "If" and redesignating subparagraphs (A), (B), (C), (D), (E), and (F) as paragraphs (1), (2), (3), (4), (5), and (6), respectively.

59. Amend § 2K1.5(b) by—

(a) Striking "(1)" immediately preceding "If" and redesignating subparagraphs (A), (B), and (C) as paragraphs (1), (2), and (3), respectively;

(b) Inserting following the redesignated paragraph (3) a new subsection title as follows: "(c) Cross Reference";

(c) Redesignating the last paragraph in that guideline section as paragraph (1) under subsection (c); and

(d) Striking "in respect to" in the redesignated paragraph (c)(1), and inserting in lieu thereof "for".

60. Amend § 2M1.1—

(a) In subsection (a) by striking "(Apply the greatest)";

(b) In paragraph (1) by striking the word "or";

(c) In paragraph (2) by striking "; or" and inserting in lieu thereof ", otherwise."; and

(d) By striking paragraph (3).

61. Amend the commentary to § 2M1.1—

(a) By striking "encompassing a" and inserting in lieu thereof "that could encompass a relatively";

(b) By inserting immediately after the word "conduct" and before the period the following: ", including many of the more specific offenses in this Part"; and

(c) By striking the last sentence.

62. Amend the first paragraph of commentary pertaining to § 2M5.1 by inserting "App." following "U.S.C." each place the latter appears.

63. Amend the title of the first subpart under Part N to read: "Tampering With Consumer Products".

64. Amend the title of § 2N1.1 to read: "Tampering or Attempting to Tamper Involving Risk of Death or Serious Injury".

65. Amend the commentary to subpart 1 of Part N by—

(a) Striking "Section 2N1.1" and inserting in lieu thereof "§ 2N1.1. This section";

(b) Striking "Section 2N1.2" and inserting in lieu thereof "§ 2N1.2. This section"; and

(c) Striking "Section 2N1.3" and inserting in lieu thereof "§ 2N1.3. This section".

66. Amend the commentary to subpart 1 of Part N by striking the fourth paragraph and inserting the material stricken as the second sentence of the first paragraph.

67. Amend the commentary to § 2N2.1 by striking "Section 2N2.1" and inserting in lieu thereof "§ 2N2.1. This section".

68. Amend the commentary to § 2N3.1 by inserting "§ 2N3.1." preceding "This section".

69. Amend § 2P1.1(b)(2) by striking "voluntary" and inserting in lieu thereof "voluntarily".

70. Amend § 2S1.3(b)(1) by striking "reasonably" and inserting in lieu thereof "knew or".

71. Under the heading "Offenses Involving Alcohol and Tobacco Taxes", amend the commentary pertaining to § 2T2.2 by striking "5" and inserting in lieu thereof "4".

72. Amend the first paragraph of commentary to subpart 2 (Offenses Involving Alcohol and Tobacco Taxes) by striking "5697" and inserting in lieu thereof "5691".

73. Amend the first paragraph of commentary to subpart 3 (Offenses Involving Customs) by striking "1568(e)" and inserting in lieu thereof "1586(e)".

74. Amend the commentary to § 2X1.1, by striking "286".

75. Amend the commentary to § 2X2.1, by striking "752-753".

76. Amend the commentary to § 2X2.1, by striking ", 2383".

77. Amend § 2X3.1(a) by striking "5," and inserting in lieu thereof "4".

78. In the commentary to § 2X3.1, strike ", 1381, 2388(c)".

#### *Amendments to Chapter Three*

1. Strike the text of § 3A1.1 (Vulnerable Victim) through the word "because" the second time such word appears and insert in lieu thereof:

"If the defendant knew or should have known that the victim of the offense was unusually vulnerable due to age, physical or mental condition, or that".

2. Amend the commentary pertaining to § 3A1.1 (Vulnerable Victim) by striking the word "substantial".

3. Amend the Introduction to Part D—  
(a) By striking the word "section" wherever it appears and inserting in lieu thereof "Part";

(b) In paragraph one by striking "Implementation of" and inserting in lieu thereof "Determining and implementing";

(c) In paragraph two by striking the word "Count" wherever that word appears immediately preceding the word "Group" or "Groups"; and

(d) In paragraph two by inserting "of Closely-Related Counts" after the word "Groups".

4. Amend § 3D1.1 (Procedure for Determination of Offense Level on Multiple Counts)—

(a) In the title by striking "Determination of" and inserting in lieu thereof "Determining";

(b) By striking the word "Count" wherever it appears in that guideline section immediately preceding the word "Group" or "Groups"; and

(c) In subsection (a) by inserting "of Closely-Related Counts ("Groups")" after the word "Groups".

5. Amend § 3D1.2 (Count Groups)—

(a) By amending the title to read: "Groups of Closely-Related Counts";

(b) In the first paragraph of text, by striking the word "Count" preceding the word "Group"; and

(c) In the first paragraph of text, by inserting the word "substantially" immediately following the word "involve".

6. Amend § 3D1.2—

(a) In subsection (c) by inserting a comma after the word "in" and a comma after the word "to" the first time the latter word appears;

(b) In subsection (d) by striking "Part L (§ 2L1.3)"; and

(c) In subsection (d) by striking "§ 2Q1.3(b)(1)(A)" and inserting in lieu thereof "§§ 2L1.3 and 2Q1.3(b)(1)(A)".

7. Amend § 3D1.3—

(a) In subsection (a) by striking "all provisions of Chapters Two and" and inserting in lieu thereof "Chapter Two and Parts A, B and C of Chapter"; and

(b) In subsection (b) by striking "Chapters" and inserting in lieu thereof "Chapter".

8. Amend § 3D1.3 (Offense Level Applicable to Each Count Group)—

(a) By amending the title to read: "Offense Level Applicable to Each Group of Closely-Related Counts";

(b) In the first sentence of text under the title by striking "the Count" and inserting in lieu thereof "each of the";

(c) In subsections (a) and (b) by striking the word "Count" wherever that word immediately precedes the word "Group";

(d) In subsection (b) by striking the word "different" and inserting in lieu thereof "the"; and

(e) By striking subsection (c).

9. Amend § 3D1.4 (Combined Offense Level)—

(a) By amending the title to read: "Determining the Combined Offense Level";

(b) By striking "most serious Count Group" wherever that phrase appears and inserting in lieu thereof "Group with the highest offense level";

(c) By striking the word "Count" wherever that word appears immediately preceding the word "Group" or "Groups";

(d) In subsection (a) by striking "Also count one" and inserting in lieu thereof "Count one additional"; and

(e) In subsection (a) by inserting the word "from" immediately following the word "or".

10. Amend § 3D1.5 (Total Punishment) to read as follows:

"§ 3D1.5. Determining the Total Punishment  
Use the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five."

11. Amend the commentary to Part D—

(a) By striking the word "Count" wherever that word appears immediately preceding the word "Group" or "Groups";

(b) In the paragraph pertaining to § 3D1.3, by inserting "of Closely-Related Counts" immediately following the word "Group";

(c) In the paragraph pertaining to § 3D1.3 by striking "§ 3D.3(c)" and inserting in lieu thereof "subsection (b)"; and

(d) By adding at the end of the first paragraph pertaining to § 3D1.4 the following new sentence: "Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of substantially more than 5 Units."

12. Amend the third illustration in the commentary to Part D by striking "§ 2F1.1(b)(1)(B)" and inserting in lieu thereof "§ 2F1.1(b)(2)(B)".

#### *Amendments to Chapter Four*

1. Amend the second paragraph of the Introduction by—

(a) Striking the word "likely" and inserting in lieu thereof "the likelihood of";

(b) Inserting "drug abuse" immediately after "age";

(c) Striking "in respect to" and inserting in lieu thereof "as to";

(d) Striking the word "presently"; and

(e) Striking "it becomes" and inserting in lieu thereof "they become".

2. In the second paragraph of text to § 4A1.3, strike "generally will occur" and insert in lieu thereof "is warranted".

3. Amend the table in § 4B1.1 under the column heading "Offense Statutory Maximum"—

(a) In (C) and (D) by inserting "or more" immediately following the word "years" the first time that word is used; and

(b) In (E) by striking "1 year & 1 day" and inserting in lieu thereof "More than 1 year".

#### *Amendments to Chapter Five*

1. Amend the second paragraph of the commentary to § 5B1.3 by redesignating 5C1.1 as 5B1.1.

2. Amend § 5B2.4(a) by striking "are those that".

3. Amend § 5B1.4(b)—

(a) By striking "are those that";

(b) By inserting "or may be appropriate in a particular case" immediately after the word "described"; and

(c) In paragraph (17) by inserting a paragraph title as follows: "Debt Obligations".

4. Amend § 5C2.1(e)(1) by striking the parenthetical phrase and inserting in lieu thereof:

"(each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours)".

5. Amend the title of § 5G1.1 by striking "On" and inserting in lieu thereof "on".

#### *Amendments to Chapter Six*

1. Amend each section title in Part B (Plea Agreements) by inserting immediately following the title: "(Policy Statement)".

2. Amend the first paragraph of commentary relating to § 6B1.2 by striking the word "may" the last time such word appears and inserting in lieu thereof "is to".

#### *Amendments to Chapter Seven*

1. Strike §§ 7A1.1 and 7A1.2 and insert in lieu thereof the following:

"§ 7A1.1. Reporting of Violations of Probation and Supervised Release (Policy Statement)

(a) The Probation Officer shall promptly report to the court any alleged violation of a condition of probation or supervised release that constitutes new criminal conduct, other than conduct that would constitute a petty offense.

(b) The Probation Officer shall promptly report to the court any other alleged violation of a condition of probation or supervised release, unless the officer determines: (1) That such violation is minor, not part of a continuing pattern of violation, and not indicative of a serious adjustment problem; and (2) that non-reporting will not present an

undue risk to the public or be inconsistent with any directive of the court relative to the reporting of violations."

2. Beginning with § 7A1.3, strike all that follows through the end of § 7A1.4(b)(2), and insert in lieu thereof the following:

"§ 7A1.2. Revocation of Probation (Policy Statement)

(a) Upon a finding of a violation of probation involving new criminal conduct, other than criminal conduct constituting a petty offense, the court shall revoke probation.

(b) Upon a finding of a violation of probation involving conduct other than conduct under subsection (a), the court may: (1) Revoke probation; or (2) extend the term of probation and/or modify the conditions of probation.

§ 7A1.3. Revocation of Supervised Release (Policy Statement)

(a) Upon a finding of a violation of supervised release involving new criminal conduct, other than criminal conduct constituting a petty offense, the court shall revoke supervised release.

(b) Upon a finding of a violation of supervised release involving conduct other than conduct under subsection (a), the court may: (1) Revoke supervised release; or (2) extend the term of supervised release and/or modify the conditions of supervised release."

3. Beginning with § 7A1.4(c), strike all through the commentary to the end of the chapter, and insert in lieu thereof the following:

§ 7A1.4. No Credit for Time Under Supervision (Policy Statement)

(a) Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.

(b) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision.

#### **COMMENTARY**

§ 7A1.1. This policy statement addresses the reporting of violations of probation and supervised release. It is the Commission's intent that significant violations be promptly reported to the court. At the same time, the Commission realizes that it would neither be practical nor desirable to require such reporting for every minor violation.

§§ 7A1.2 and 7A1.3. These policy statements express a presumption that probation and supervised release are to be revoked in the case of new criminal conduct other than a petty offense. For lesser violations, the policy statements provide that the court may revoke probation or supervised release; or may extend the term of supervision or modify the conditions of supervision.

§ 7A1.4. This policy statement provides that time spent on probation or supervised release is not to be credited in the determination of any term of imprisonment imposed upon revocation."

*Amendments of General Application*

1. Amend the title to Chapter Four wherever that chapter is referred to in its entirety, to read: "Criminal History and Criminal Livelihood".
2. Amend the Table of Contents by—
  - (a) Amending the title of Chapter One to read: "Chapter One: Introduction and General Application Principles";
  - (b) Inserting "Part A—Introduction" following the Chapter One title;
  - (c) Striking "6. Application Instructions";
  - (d) Inserting "Part B—General Application Principles" following the subparts to Part A of Chapter One and preceding Chapter Two;
  - (e) Amending the title of Chapter Four to read: "Chapter Four: Criminal History and Criminal Livelihood";
  - (f) Striking "(Forthcoming)" following the heading "Statutory Index"; and
  - (g) Conforming the page numbers.

*Amendments to Statutory Listings in Chapter Two*

1. In the listing of statutes following the heading "Homicide", strike "18 U.S.C. § 113(a)".
2. In the listing of statutes following the heading "Criminal Sexual Abuse", strike "18 U.S.C. §§ 2031-2032".
3. In the statutory listing following the title to subpart 3 (Criminal Sexual Abuse), strike "2245" and insert in lieu thereof "2244".
4. In the statutory listing following the title to subpart 5 (Air Piracy), strike "(c)".
5. In the listing of statutes following the heading "Theft, Embezzlement, Receipt of Stolen Property, and Property Destruction", strike "§§ 1700-1701" and insert in lieu thereof "1701".
6. In the listing of statutes following the heading "Commercial Bribery and Kickbacks"—
  - (a) Strike "18 U.S.C. § 1954"; and
  - (b) Strike "41 U.S.C. §§ 51-54" and insert in lieu thereof:  
"41 U.S.C. 51  
41 U.S.C. 53-54".
7. In the listing of statutes following the heading "Counterfeiting", strike "18 U.S.C. § 495".
8. In the listing of statutes following the heading "Labor Racketeering"—
  - (a) Strike "18 U.S.C. § 1231";
  - (b) Strike "29 U.S.C. §§ 431-439" and insert in lieu thereof:  
"29 U.S.C. 431-433  
29 U.S.C. § 439"; and
  - (c) Strike "29 U.S.C. § 162", "29 U.S.C. § 504", "29 U.S.C. § 530", "29 U.S.C. § 1111", and "29 U.S.C. § 1141".
9. In the listing of statutes following the heading "Part F—Offenses Involving Fraud or Deceit"—

(a) Insert after "7 U.S.C. § 23" the following:

"15 U.S.C. 50  
15 U.S.C. 77e  
15 U.S.C. 77q  
15 U.S.C. 77x  
15 U.S.C. 78d  
15 U.S.C. 78j  
15 U.S.C. § 78ff  
15 U.S.C. § 80b-6";

(b) Strike "15 U.S.C. 77a-80b-17", "18 U.S.C. § 371" and "18 U.S.C. § 656"; and

(c) Strike "18 U.S.C. §§ 1001-1030" and insert in lieu thereof:

"18 U.S.C. 1001-1008  
18 U.S.C. 1010-1014  
18 U.S.C. 1016-1022  
18 U.S.C. 1025-1026  
18 U.S.C. 1028-1029".

10. In the statutory listing following the title to subpart 2 (Political Rights), strike "2 U.S.C. § 437g(d)".

11. In the statutory listing following the title to subpart 3 (Privacy and Eavesdropping), strike "21 U.S.C. § 842(a)(8)".

12. In the listing of statutes following the heading "Part J—Offenses Involving the Administration of Justice", strike "18 U.S.C. § 1073" and "18 U.S.C. § 1581(a)".

13. In the listing of statutes following the heading "Naturalization and Passports", strike "1429" and insert in lieu thereof "1428".

14. In the listing of statutes following the heading "Prohibited Financial Transactions and Exports", strike "50 U.S.C. App. § 2401-2420" and insert in lieu thereof: "50 U.S.C. App. 2410".

15. In the statutory listing following the title to subpart 6 (Atomic Energy), strike "42 U.S.C. § 2136".

16. In the statutory listing following the title to Part S (Money Laundering and Monetary Transaction Reporting), strike "371, 1001".

17. In the statutory listing following the title to subpart 2 (Alcohol and Tobacco Taxes), strike "5697" and insert in lieu thereof "5691".

18. In the statutory listing following the title to subpart 3 (Customs Taxes), strike "1568(e)" and insert in lieu thereof "1586(e)".

19. In the listing of statutes following the heading "Conspiracies, Attempts, Solicitations", strike "18 U.S.C. § 286".

20. In the listing of statutes following the heading "Customs Taxes", strike "1951" and insert in lieu thereof "1915".

21. In the listing of statutes following the heading "Political Rights", strike "18 U.S.C. § 1341" and "18 U.S.C. § 1343".

*Amendment Inserting the Statutory Index*

1. Following Chapter Seven, strike "APPENDIX A: STATUTORY INDEX

(Forthcoming)" and insert in lieu thereof the Statutory Index.

**Appendix A—Statutory Index***Introduction*

This index specifies the guideline section or sections ordinarily applicable to the statute of conviction. If more than one guideline section is referenced for the particular statute, select the guideline most appropriate for the conduct of which the defendant was convicted. If, in an atypical case, the guideline section indicated for the statute of conviction is inappropriate because of the particular conduct involved, the court is to apply the guideline section which is most applicable to the conduct for which the defendant was convicted. (See § 1B1.2.)

If the offense involved a conspiracy or an attempt, refer to § 2X1.1 as well as the guideline for the substantive offense.

For those offenses not listed in this index, the most analogous guideline is to be applied. (See § 2X5.1.)

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## Explanation of Technical, Conforming, and Clarifying Amendments to Initial Sentencing Guidelines

### *Amendments to Chapter One*

Amendment 1 conforms the title of Chapter One to a reorganization of parts of Chapters One and Two. The Commission has decided to combine the Application Instructions at the end of Chapter One with the General Principles at the beginning of Chapter Two (some of which apply to determinations beyond Chapter Two). The newly combined sections will become Part B of Chapter one.

Amendment 2 relabels the initial five sections of Chapter One as the Introduction to the guidelines. Together with the commentary accompanying and explaining the guidelines, this Introduction may be considered the Commission's "report stating the reasons for the Commission's recommendations." See Section 235(a)(1)(B)(ii) of the Comprehensive Crime Control Act of 1984. A Supplemental Report containing additional supporting information, including an analysis and discussion of the impact of the guidelines on correctional resources, will be submitted to Congress in the near future.

Amendment 3 is a simple wording clarification.

Amendment 4 corrects a typographical error.

Amendment 5 clarifies the discussion with respect to court discretion to impose less severe sentences on defendants who accept responsibility for their criminal actions and/or cooperate with the government.

Amendment 6 clarifies that the Commission's estimate of prison population increase attributable directly to the sentencing guidelines is approximately 10 percent over a period of 10 years.

Amendment 7 inserts a new chapter part heading to conform with the reorganization discussed in the explanation of amendment one above.

Amendment 8 conforms the section on "Application Instructions" with the stated reorganization and redesignates it as a guideline.

Amendment 9 strikes superfluous text.

Amendments 10 through 14 restate more clearly the Application Instructions and conform them to the guideline chapters, parts and sections to which they apply.

### *Amendments to Chapter Two*

Amendments 1 through 12, 14, and 17 implement a reorganization pursuant to which the Overview in Chapter Two is moved to Part B of Chapter One. In

addition, the instructions for applying the guidelines and their scope are clarified.

Amendment 13 inserts a new section which clarifies the interpretation of cross references to other guidelines.

Amendment 15 conforms the terminology to that used elsewhere in the guidelines.

Amendment 16 inserts a new section which clarifies the force to be given to the official commentary to the guidelines.

Amendment 18 clarifies the intended meaning of the guidelines.

Amendment 19 conforms § 2A3.4(b)(1) to § 2A3.1(b)(1).

Amendment 20 clarifies the commentary.

Amendments 21 and 22 clarify the intended meaning of the guidelines.

Amendments 23 and 25 clarify the intended meaning of the guidelines and conform the language to that used in other sections.

Amendments 24, 26, and 27 delete inapt statutory references.

Amendments 28 and 29 conform references to other guidelines.

Amendment 30 conforms the numbering of the guideline subsections to the style used elsewhere.

Amendment 31 corrects a typographical error and makes the guideline consistent with § 2C1.2.

Amendment 32 clarifies the intended meaning of the guidelines.

Amendment 33 clarifies the chemical reference by substituting the more commonly-used name of the substance.

Amendment 34 conforms entries in the table to make it clear that the offense levels applicable to larger quantities also apply to equivalent quantities of marihuana plants, hashish, and hashish oil.

Amendment 35 corrects a statutory reference.

Amendment 36 corrects a typographical error.

Amendment 37 conforms the commentary to the text of the guideline.

Amendment 38 clarifies the commentary to § 2D1.1 insofar as it relates to drug equivalencies and multiple drugs.

Amendments 39 through 46 clarify the Drug Equivalency Tables and correct numerical errors contained therein.

Amendment 47 conforms the guideline to the statute.

Amendment 48 clarifies the intended meaning of the guidelines and conforms the language to that used in other sections.

Amendments 49 through 51 clarify the intended meaning of the guidelines.

Amendments 52 and 53 delete inapt statutory references.

Amendments 54 and 56 clarify the intended meaning of the guideline and replace commentary that was mistakenly inserted.

Amendment 55 conforms the guideline style to that used elsewhere.

Amendments 57 through 59 conform the numbering of the guideline subsections to that used elsewhere.

Amendments 60 and 61 clarify the intended meaning of the guidelines.

Amendment 62 corrects an omission in certain statutory references.

Amendments 63 and 64 clarify the headings.

Amendments 65, 67, and 68 conform the commentary to the style used elsewhere.

Amendment 66 clarifies the scope of certain commentary.

Amendment 69 corrects a typographical error.

Amendment 70 clarifies the intended meaning of the guideline.

Amendment 71 conforms the commentary to the guideline text.

Amendments 72 and 73 correct typographical errors.

Amendments 74 through 76 delete inapt statutory references.

Amendment 77 corrects a numerical error.

Amendment 78 deletes inapt statutory references.

### *Amendments to Chapter Three*

Amendments 1 and 2 clarify the intended meaning of the guidelines.

Amendments 3 through 11 clarify the intended meaning of Part D of Chapter Three and make conforming wording changes.

Amendment 12 corrects a typographical error.

### *Amendments to Chapter Four*

The amendments clarify the intended meaning of the provisions.

### *Amendments to Chapter Five*

Amendments 1 through 4 clarify the intended meaning of the provisions.

Amendment 5 corrects a typographical error.

### *Amendments to Chapter Six*

Amendment 1 conforms the style to that used elsewhere.

Amendment 2 conforms the commentary to the policy statement.

### *Amendments to Chapter Seven*

The amendments to Chapter Seven delete the guidelines pertaining to violations of probation and supervised release and replace them with policy statements. Subsequent to the Commission's approval of the guidelines

in Chapter Seven, it became apparent that several provisions in this Chapter, as written, might produce unintended results. Inasmuch as the statute provides that the Commission may issue either guidelines or policy statements covering these provisions, the Commission has elected to delete for the present the promulgated guidelines pertaining to violations of probation and supervised release and re-issue policy statements covering these areas. The Commission intends to devote further study to this subject and may promulgate guidelines covering it at a future date.

#### *Amendments of General Application*

The amendments conform the headings and Table of Contents to changes made elsewhere.

#### *Amendments to Statutory Listings*

Amendments 1, 2, 4 through 12, 14 through 16, 19 and 21 delete inapt statutory references or limit broader statutory references.

Amendments 3, 13, 17, 18, and 20 correct typographical errors.

#### *Amendment Inserting Statutory Index*

The amendment adds the Statutory Index at the end of the guidelines following Chapter Seven.

### **DISSENTING VIEW OF COMMISSIONER PAUL H. ROBINSON\* ON THE PROMULGATION OF SENTENCING GUIDELINES BY THE UNITED STATES SENTENCING COMMISSION**

May 1, 1987

\*Commissioner Ronald L. Gainer, the ex-officio Commissioner from the United States Department of Justice, has argued strongly for the principles advanced here, particularly those noted in Sections 1 and 2. Because, in his view, the Commission's guidelines reject these principles, he asked the Commission to note in its publication of the guidelines that "if he were a voting Commissioner, as a personal matter, he would not have voted to support the guidelines in their current form." Transmittal Letter to Congress from the United States Sentencing Commission, April 13, 1987.

[Note.—A Summary of Commissioner Robinson's points appears on the last three pages.]

#### *Dissenting View Of Commissioner Paul H. Robinson:*

When it passed the Sentencing Reform Act of 1984, by a vote of 91 to 1 in the Senate and 316 to 91 in the House, the United States Congress committed the federal system to rationality and consistency in criminal sentencing. The Act built upon a decade of state experience in sentencing reform, but devoted resources on a greater scale and called for sentencing guidelines of a higher order of sophistication than any

existing system. With that Act, Congress announced its inspired vision for modern American sentencing.

The vision was rationality in criminal sentencing. Rather than simply continuing past practices, the newly-created United States Sentencing Commission was directed to devise and articulate a sentencing policy. That sentencing policy was, in turn, to direct the decisions necessary for guidelines that would further the statutorily-defined purposes of sentencing—the imposition of just punishment, the deterrence of potential offenders, the incapacitation of dangerous offenders, and, where possible, rehabilitation. The ultimate goal was a rational sentencing system and a system that would be perceived as rational.

The vision was consistency in criminal sentencing. Instead of 1,042 federal judges and magistrates imposing discretionary sentences in more than 102,000 cases annually,<sup>1</sup> the new Commission was to devise comprehensive and binding sentencing guidelines. Judges were to be bound by the guidelines unless there existed in a case an unusual factor that "was not adequately taken into consideration" by the Commission in drafting the guidelines.<sup>2</sup> This would be a rare case because the guidelines were to take account of "every important factor relevant to sentencing."<sup>3</sup> The guideline imprisonment range for each combination of offense and offender characteristic was to be narrow—not more than 25%.

The Congressional vision of sentencing reform also showed wisdom and self-restraint; Congress chose to forego the opportunities for posturing that come with crime and punishment issues. It took the high road, delegating the task of rational sentencing reform to what was to be an independent, nonpolitical Commission of experts, giving the Commission the power to promulgate the new sentencing system without further action by Congress.

Such invitations to visionary reform are the sort of rare events that inspire men and women to their greatest accomplishments. With the guidelines promulgated today, however, the vision dims.

<sup>1</sup> Last year, federal district court judges (575 authorized) sentenced 40,740 offenders; 467 active magistrates sentenced 61,839, for a total of 102,579. Administrative Office of the United States Courts, 1986 Annual Report of the Director, Appendix I at 56-57, 102-103 (1986) [hereinafter cited as 1986 Annual Report].

<sup>2</sup> 18 U.S.C. 3553(b).

<sup>3</sup> S. Rep. No. 225, 98th Cong., 1st Sess. 169 (1983) [hereinafter cited as S. Rep. No. 225].

### **1. The Failure to Provide a Rational and Coherent Sentencing System**

Of all of the goals of the Sentencing Reform Act, it is most unfortunate that the goal of rationality has been abandoned and even frustrated by these guidelines.

**The Failure to Define a Rational and Coherent Policy and to Provide Sentences Calculated to Achieve the Statutory Purposes of Sentencing.** The Act requires the Commission to establish guidelines designed to "assure the meeting of the purposes of sentencing [i.e., just punishment, deterrence, incapacitation of the dangerous, and rehabilitation]."<sup>4</sup> Instead of calculating sentences to achieve such statutory purposes, however, the guidelines simply mimic the mathematical averages of past sentences.<sup>5</sup>

To improve its ability to further the statutory purposes, the Commission was expected to "develop and coordinate research studies (including, for example, basic research on sentencing theories as well as applied research on the effectiveness of certain policies)."<sup>6</sup> In contrast, the Commission neither undertook studies nor gave serious consideration to existing studies on the means of achieving deterrence and incapacitation. Nor did the Commission undertake studies or systematically consider existing studies on public perceptions of relevant sentencing factors and their appropriate weight for punitive purposes. While the guidelines'

<sup>4</sup> 28 U.S.C. 991(b)(1)(A).

<sup>5</sup> See Final Draft at 1.4 [hereinafter "F.D."].

For now, the Commission has sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that uses data estimating the existing sentencing system as a starting point. . . . The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. . . .

The Revised Draft [hereinafter "R.D."] collected all known sentencing platitudes and called them the "Principles of Sentencing" of the guidelines. R.D. at 2. Admirably, the final guidelines drop this pretense, but such honesty is no substitute for the Act's requirement that the guidelines "assure the meeting of the [statutory] purposes of sentencing."

<sup>6</sup> S. Rep. No. 225 at 160, 28 U.S.C. 995(a)(12)-(16) outlines the extensive research and data collection and dissemination authority of the Commission. "These functions are essential to the ability of the Sentencing Commission to carry out two of its purposes: the development of a means of measuring the degree to which various sentencing, penal, and correctional practices are effective in meeting the [statutory purposes of sentencing] [28 U.S.C. 991(b)(2)] and the establishment (and refinement) of sentencing guidelines and policy statements that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process. [28 U.S.C. 991(b)(1)(C)]." S. Rep. No. 225 at 182.

commentary sometimes gives reasons for the adoption of a particular policy, neither the guidelines nor the commentary cite a single empirical research study.

Rather than being guided by the statutory purposes of sentencing, the guideline drafting reflected simply a haphazard "fiddling with the numbers" that established the guideline sentences. The lack of a credible basis for the numbers became painfully obvious, however, and in the last few weeks, the intuitive approach was abandoned in favor of "past sentencing averages" as the primary basis for establishing guideline sentences. Because they simply continue what judges do, some will argue, the effects of these guidelines need not be explained or defended.

In addition to the criticisms that are detailed below, the guideline's claimed past-practice "principle" of drafting may be challenged on the grounds that it is not followed. Offenders under current practice receive sanctions other than imprisonment (e.g., fines, conditions of probation) in approximately 50% of the cases,<sup>7</sup> yet the guidelines provide for imprisonment in all but the most minor cases. If the "theory" of the guidelines is that they simply follow past practices, how can the effect of the guidelines so dramatically deviate from past practice? My own view is that, in many cases, reducing the availability of probation or, at very least, making probation more punitive, would further the statutory purposes of sentencing. But the guideline drafters have rejected this sort of principled approach—i.e., devising sentences to meet the statutory goals.

**The Impropriety of Basing Guidelines on Mathematical Averages of Past Sentences.** Attempting to use mathematical averages of past sentences as a means of drafting guidelines is, in my view, unacceptable for four reasons. The first and most serious is that a sentence based on a mathematical average of past sentences is likely to be an irrational sentence. Two judges may each follow a rational sentencing philosophy designed to achieve legitimate sentencing purposes yet, because their philosophies differ, as they commonly do, the sentences that they impose may differ. (As shall be discussed later, this is a major source of sentencing disparity.)<sup>8</sup> Because each of the two sentences rationally serves its purpose, however, it does not follow that a mathematical average of the judges' sentences will be rational. Consider, for example, the case of a

young addict who sells drugs to acquaintances to support his own habit. One judge may impose a long term of imprisonment in order to send a strong deterrent message to drug sellers. Another judge may impose a very short term of incarceration followed by supervised release conditioned upon the offender's participation in a community drug treatment program in the belief that curing the offender's addiction is more likely to remove him from the roll of drug dealers.

The guidelines might rationally embody either of such alternative policies. But by adopting no policy, and relying upon a mathematical average of sentences, the guidelines provide "bastardized" sentences that will serve neither of the two purposes. For the young addict, the "averaged" sentence will be too short to send the strong deterrent message, and will not provide the treatment necessary for rehabilitation.

A second reason to avoid sentences based on past sentencing averages is that Congress, in the Sentencing Reform Act, disapproved that method. The Commission is to ascertain past sentencing averages, but, in the language of the statute, "[t]he Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code."<sup>9</sup>

The elusive contours of past practice provide a third reason to avoid reliance on such past practice. Precise time-served information is often unavailable until many years after an offender is sentenced (because it is the Parole Commission that determines his actual release date). Estimates of time served may be developed by projecting the probable effects of parole guidelines and good-time accrual, but these projections are ultimately "time-served speculations." In addition, there is little available data on many of the factors that are clearly relevant to sentencing. Thus, gross averages of sentences for a given offense may have limited relevance to the particular circumstances of the offense before the judge. For example, the average sentence for armed bank robberies generally would be an inappropriate basis for setting the sentence for armed bank robbery involving gratuitous violence against a vulnerable victim.

The consultant hired by the Commission to review its current sentencing data and analysis methods concluded as follows:

To summarize, the Commission will be guilty of misusing [the Research Director's] results if the "typical" sentences produced by his models are taken literally as accurately characterizing the past. His results provide a picture of the past in very broad brush strokes; they should be used to stimulate thought and discussion and could be very useful if put to these ends.<sup>10</sup>

Yet this warning was ignored when guideline sentences were set according to the data's mathematical averages of past sentences for the offense.

Even if precise and reliable *time-served* speculations could be attained, it is inaccurate to treat the averages of time-served as representative of past sentencing practice generally, as the guidelines do.<sup>11</sup> The time-served data reflects only the sentences for those offenders sent to prison, presumably the worst cases. By eliminating all past nonincarcerative sentences from the "averages" calculations, the guidelines seriously distort their claimed replication of past practice.

My own view is that there are very frequently good reasons to impose longer terms of imprisonment than have been imposed in the past. But guidelines for such longer sentences, as with guidelines for all sentences, ought to be based on a rational policy decision that the particular sentence will achieve the statutory purposes of sentencing. It ought not be the accidental (or intentional) result of manipulation of past practices data.

A fourth reason to disagree with the guideline's claimed reliance on past practice is that it would be difficult if not impossible to embody past practice in a sentencing system as ambiguous and discretionary as this one. With such broad discretion, judges will give the sentences they feel are appropriate. If told to exercise their discretion, they have no reason to adhere to the

<sup>10</sup> Letter from Dr. Richard Berk, Professor of Sociology and Director, Social Process Institute, University of California—Santa Barbara, to Suzanne Conlon, Executive Director of the Commission (January 14, 1987).

<sup>11</sup> The Research Director tells me that he believes that the average-sentence figures were sometimes discounted in situations in which the percentage of probation cases was high. How and when this was done is unclear. But one may ask, if averages of past sentences are to be the theory of the guidelines, why were probation cases not calculated into that average? If past practice is not to be followed, what are the principles that the guidelines have followed?

<sup>7</sup> 1986 Annual Report at 58-61.

<sup>8</sup> See notes 71-72 and accompanying text *infra*.

<sup>9</sup> 28 U.S.C. 994(m) (emphasis added). The statutory purposes of sentencing are set out in the text accompanying note 4 *supra*.

mathematical averages of past practices of other judges.

I believe that the real value of past-practice data is as a point of comparison after guidelines are, as the statute requires, "independently developed" to further the statutory purposes of sentencing. Significant differences between guideline and past-practice sentences can then identify points of potential controversy, which may merit closer analysis to assure the soundness of the underlying rationale. Such comparisons might also be utilized to project changes in needed prison capacity and probation services. Past practice cannot be properly or legally used, as the guidelines use it, as a "theory" or "principle" for guideline drafting.

For many of these reasons, several Commissions, including Minnesota and Washington, have rejected such a "descriptive" past-practices approach in favor of a "prescriptive" approach in which sentences are calculated to achieve one or more specified sentencing purposes.<sup>12</sup>

**The Failure To Rank Systematically Offenses According to Seriousness.** Perhaps the most basic and the most obvious initial step in constructing rational guidelines is to systematically rank offenses according to their relative seriousness. Deterrence and just punishment both call for more serious offenses to be sanctioned more seriously, as does the Sentencing Reform Act.<sup>13</sup> Unfortunately, the guidelines do not reflect a systematic ranking of offenses determined after analysis of existing research studies on relative societal harm and on public perceptions of relative seriousness.

As one might predict, the guidelines create significant anomalies. Under the guidelines, the judge could give the same sentence for abusive sexual contact that puts the child in fear<sup>14</sup> as for unlawfully entering or remaining in the United States.<sup>15</sup> Similarly, the guidelines permit equivalent sentences for the following pairs of offenses: Drug trafficking<sup>16</sup> and

a violation of the Wild Free-Roaming Horses and Burros Act;<sup>17</sup> arson with a destructive device<sup>18</sup> and failure to surrender a cancelled naturalization certificate;<sup>19</sup> operation of a common carrier under the influence of drugs that causes injury<sup>20</sup> and alteration of one motor vehicle identification number;<sup>21</sup> illegal trafficking in explosives<sup>22</sup> and trespass;<sup>23</sup> interference with a flight attendant<sup>24</sup> and unlawful conduct relating to contraband cigarettes;<sup>25</sup> aggravated assault<sup>26</sup> and smuggling \$11,000 worth of fish.<sup>27</sup>

**The Failure to Provide Different Sentences for Cases that are Very Different in Seriousness: Promoting "Free" Harms and Ignoring Relevant Mitigations.** The most basic function of any rational sentencing system is to provide appropriately different sentences for cases that are meaningfully different. Taking account of relevant aggravating and mitigating factors assures that additional harms

will not go unpunished—that there are no "free" harms—and that significant mitigations will be reflected in an appropriately reduced sanction. These guidelines, however, systematically promote "free" harms and ignore relevant mitigations.

First, despite a "Relevant Conduct" provision that seems to suggest that the guidelines take account of most aspects of the offender's conduct,<sup>28</sup> the only conduct or factors that the judge is permitted to take into account under the guidelines are those specifically listed in the applicable guideline section.<sup>29</sup> For example, because the burglary guideline does not specifically aggravate the guideline sentence where the offender causes physical injury, the burglar who beats a homeowner will be treated the same as the burglar who does not. That is, the beating of the homeowner is "free" in burglary, as it is in a host of other offenses.<sup>30</sup> Section 2, below, gives many other examples of highly relevant factors that are omitted from the guidelines,<sup>31</sup> thus treating very different cases the same.

<sup>17</sup> See F.D. 2Q2.1 (base offense level 6, 0-6 months).

<sup>18</sup> See F.D. 2K1.4 (base offense level 6), 2K1.4(b)(F) (+2 levels) (Total=offense level 8, 2-8 months).

<sup>19</sup> See F.D. 2L2.5 (base offense level 6, 0-6 months).

<sup>20</sup> See F.D. 2D2.3 (base offense level 8, 2-8 months).

<sup>21</sup> See F.D. 2B6.1 (base offense level 8, 2-8 months).

<sup>22</sup> See F.D. 2K1.3 (base offense level 6, 0-6 months).

<sup>23</sup> See F.D. 2B2.3 (base offense level 4, 0-4 months).

<sup>24</sup> See F.D. 2A5.2(4) (base offense level 9, 4-10 months).

<sup>25</sup> See F.D. 2E4.1(a)(1) (base offense level 9, 4-10 months).

<sup>26</sup> See F.D. 2A2.2 (base offense level 15, 18-24 months).

<sup>27</sup> See F.D. 2Q2.2(a)(1) (base offense level 8), 2Q2.2(b)(1) (+2 levels), 2Q2.2(b)(2) (+2 levels), 2Q2.2(b)(3)(A) (+3 levels) (Total=offense level 13, 12-18 months).

Similarly, the guidelines provide equivalent punishments for the following: shipping 50 weapons to a prohibited person (see F.D. 2K2.1, base offense level 9, 4-10 months) and embezzling \$150 from an employee pension plan (see F.D. 2E5.2, base offense level 4), 2E5.2(b)(2) (+2 levels), 2E5.2(b)(3) (+1 level) (Total=offense level 7, 1-7 months); involving a minor in drug trafficking (see F.D. 2D1.2(a)(1), base offense level 13, 12-18 months) and attempting to break into a warehouse (see F.D. 2B2.2, base offense level 12, 10-16 months); reckless homicide (see F.D. 2A1.4(a)(2), base offense level 14, 15-21 months) and transmitting wagering information (see F.D. 2E3.2, base offense level 12, 10-16 months); firebombing a residence (see F.D. 2K1.4, base offense level 6), 2K1.4(b)(1)(A) (+18 levels) (Total=offense level 24, 51-63 months) and threatening to tamper with consumer products (see F.D. 2N1.1, base offense level 25, 57-71 months); forcibly extorting \$50,000 by causing bodily injury (see F.D. 2B3.2, base offense level 18), 2B3.2(b)(1) (+2 levels), 2B3.2(b)(3) (+2 levels) (Total=offense level 22, 41-51 months) and spray-painting a house in retaliation for testimony (see F.D. 2J1.2, base offense level 12), 2J1.2(b)(1) (+8 levels) (Total=offense level 20, 33-41 months).

<sup>28</sup> F.D. 1B1.3(a), entitled "Relevant Conduct," provides:

Unless otherwise specified under the guidelines, conduct and circumstances relevant to the offense of conviction means: acts or omissions committed or aided and abetted by the defendant, or by a person for whose conduct the defendant is legally accountable, that (1) are part of the same course of conduct, or a common scheme or plan, as the offense of conviction, or (2) are relevant to the defendant's state of mind or motive in committing the offense of conviction, or (3) indicate the defendant's degree of dependence upon criminal activity for a livelihood.

<sup>29</sup> See F.D. at 1.12 ("Application Instructions," steps 1-3).

<sup>30</sup> See text accompanying note 48 infra.

<sup>31</sup> For many offenses, the guidelines ignore most of the relevant factors, thus inviting possibilities for cumulative irrationality. Consider the cases of offender A who slips something into his girlfriend's drink and attempts to have sexual intercourse with her, but is stopped, and offender B who stalks his intended rape victim for two weeks, rapes her at knifepoint in her apartment, knocks her unconscious, and sets fire to her apartment before leaving (but she is rescued unharmed). Because none of the aggravating factors in the second case are recognized by the rape guideline, both offenders could receive the same guideline sentence. See F.D. 2A3.2 (criminal sexual abuse, base offense level 27), 2A3.1(b)(1) (+4 levels) (Total=offense level 31, 108-235 months).

Similarly, the father who returns from a hunting trip and sees his child run over and killed by a drunk driver and who immediately shoots and kills the driver with his hunting gun, will be punished the same as the offender who repeatedly stabs and kills a person who punched him in a barroom brawl. For both offenders, see F.D. 2A1.3 (voluntary manslaughter, base offense level 25, 57-71 months). The offender who routinely employs scores of aliens on his tomato farm will receive the same sentence as one of the illegal aliens he employs. See F.D. 2L1.2 (unlawfully entering or remaining in the United States) and F.D. 2L1.3 (engaging in a pattern of employment of aliens) (both have base offense level 6, 0-6 months).

<sup>12</sup> See, e.g., M. Tonry, *Sentencing Reform Impacts* (1987).

<sup>13</sup> See, e.g., 28 U.S.C. 991(b)(1)(A) (the Commission shall promulgate guidelines that assure the meeting of the statutory purposes of sentencing, including the need for an offender's sentence "to reflect the seriousness of his offense").

<sup>14</sup> See F.D. 2A3.4 (base offense level 6), 2A3.4(b)(2) (+4 levels) (Total=offense level 10, 6-12 months).

<sup>15</sup> See F.D. 2L1.2 (base offense level 6), 2L1.2(b)(1) (+2 levels) (Total=offense level 8, 2-8 months).

<sup>16</sup> See F.D. 2D1.1(a)(3) (base offense level 6, 0-6 months).

The guidelines routinely ignore the difference between a completed offense and an unsuccessful attempt or a mere threat.<sup>32</sup> Thus, the offender who telephones a witness in a trial and threatens to throw eggs at her car is treated the same as he would be if he had firebombed her car, seriously burning her.<sup>33</sup> Indeed, under the guidelines, one judge can frequently give a higher sentence to an offender who unsuccessfully attempts or threatens an offense than another judge gives to an offender who successfully completes the same offense under the same circumstances.<sup>34</sup>

<sup>32</sup> For example, the Final Draft provides the same sentence for rape and attempted rape (2A3.1), tampering with a public water system and an attempt to tamper (2Q1.4), and inciting a prison riot and attempting to incite a prison riot (2P1.3). See also F.D. 2X1.1(a) (the general attempt provision).

<sup>33</sup> See F.D. 2J1.2 (obstruction of justice, base offense level 12), 2J1.2(b)(1) (+8 levels) (Total = offense level 20, 33–41 months). Similarly, the offender who injects halloween candy with LSD and thereby injures many children, is treated the same as he would be if he had abandoned his attempt before he injected the drug. See F.D. 2N1.1 (tampering or attempting to tamper with consumer products, base offense level 25, 57–71 months).

<sup>34</sup> For example, under F.D. 2N1.1, note 33 *supra*, the latter offender could get 5 years, 11 months; the former could get 4 years, 9 months.

Even where a factor is included in the guidelines, one or another structural device may well cause it to be ignored. For example, the guidelines' common cross-references, which refer the judge from one offense guideline to another, instruct that only the more serious of the multiple offenses be taken into account. Thus, if the defendant assaults a passenger while interfering with a flight crew, the cross-reference to assault makes the endangerment of the aircraft and the passengers free, and the offender is treated the same as an assaulter who does not endanger an aircraft and its passengers. See F.D. 2A5.2(a)(3). If the defendant causes death or intends to cause physical injury while committing arson, the reference to the homicide guideline makes the arson free. See F.D. 2K1.4(c)(1). If the defendant wiretaps to facilitate another offense, the reference to the other offense makes the wiretapping free. See F.D. 2H3.1(a)(2). Similarly, if the defendant interferes with interstate commerce by robbery or extortion, the reference to those offenses makes the disruption of commerce free. See F.D. 2E1.5.

The guideline direction to "use the greatest" aggravator when multiple aggravators apply is another structural mechanism that systematically creates "free" harms and ignores important differences between cases. All aggravators but the most serious are consequently ignored. Consider the case of two Ku Klux Klan members who attempt to murder a black family by burning their \$100,000 home at 3 a.m., but the family escapes unharmed. If convicted of arson, only the greatest aggravator—creating a substantial risk of death or serious bodily injury—applies. Aggravators for destruction of a residence, deprivation of civil rights, and \$100,000 of property damage are ignored. See F.D. 2K1.4(b)(1)(C) (12 levels), (b)(1)(D) (7 levels), and (c)(2) (7 levels lost by the cross-referencing technique).

The guidelines' treatment of multiple offenses is yet another source of systematically ignoring additional factors and additional offenses. The guidelines provide no additional sanction for additional offenses against the same victim during the same "transaction."<sup>35</sup> Thus, upon convictions for transportation for the purposes of prostitution and for aggravated assault on one of the prostitutes, the court can only sanction the offender for the more serious offense; the other is "free." Nor is there additional sanction where multiple offenses are part of the same "common scheme or plan" against the same victim.<sup>36</sup> Thus, after robbing the local postmaster once, all subsequent robberies of the postmaster as part of the same scheme are "free."

Even where offenses are unrelated and against different victims, frequently only the most serious offense is punished; the others are "free."<sup>37</sup> Thus, if one assault victim suffers serious bodily injury, the wounding of two other victims on two other occasions will go unsanctioned under the guidelines. Still further, because amounts are often accumulated, multiple offenses of a similar nature are often treated as a single offense. Thus, an offender who defrauds two widows of \$100,000 is treated the same as he would be if he had defrauded 40 widows of \$5,000 each.<sup>38</sup>

The guidelines' multiple-offenses provision appears to be in direct violation of the Sentencing Reform Act's requirement that the guidelines provide "an incremental penalty for each offense in a case in which a defendant is convicted of (A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and (B) multiple offenses committed at different times. . . ."<sup>39</sup>

<sup>35</sup> See F.D. 3D1.2(a).

<sup>36</sup> See F.D. 3D1.2(b).

<sup>37</sup> See F.D. 3D1.2(c).

<sup>38</sup> See F.D. 2F1.1(b)(2)(B). Likewise, theft of one \$10,000 ring is sanctioned the same as ten thefts, on different occasions, each of a \$1,000 ring (see F.D. 2B1.1). A defendant who evades \$10,000 in taxes for five years is treated similarly to the defendant who evades \$50,000 in taxes in one year. The pattern of evasion would be ignored (see F.D. 2T1.1). Similarly, since the number of victims is irrelevant under the guidelines, the drug dealer who sells ten grams of heroin drugs to five different people is treated the same as the dealer who sells fifty grams of heroin to one person (see F.D. 2D1.1). For each example, see also F.D. 3D1.2(d).

<sup>39</sup> 28 U.S.C. 994(1). "If no such incremental penalty were provided . . . an offender who commits one offense would be faced with no deterrent to the commission of another during the interval before he is called to account for the first." S. Rep. No. 225 at 176–177.

**The Failure to Address the Problems of Fragmented and Overlapping Offenses.** A serious structural flaw of the guidelines is their reliance upon the specific code provisions of federal law, which Congress itself has described as being archaic, fragmented, and overlapping.<sup>40</sup> Arson, for example, may be punished under a host of different code sections. Because the guidelines correspond to these sections, the same fragmentation is reproduced in the guidelines. The identical arson conduct might fall under any number of guideline sections, each with different values of seriousness and different aggravating factors.<sup>41</sup> What is needed is a

<sup>40</sup> The Senate Report for S. 1437, the Criminal Code Reform Act of 1977, which passed the Senate 72 to 15 in the 95th Congress, describes it as follows:

Present statutory criminal law on the Federal level is often a hodgepodge of conflicting, contradictory, and imprecise laws with little relevance to each other or to the state of the criminal law as a whole. . . . Unlike several of the States, and unlike most of the other countries of the world, the United States has never enacted a true "criminal code." . . . As a result, the Federal criminal law has always remained a consolidation—a body of law drafted by different groups to deal with diverse problems on an ad hoc basis—rather than a uniformly drafted, consistently organized code.

Like a prism, present law . . . diffracts one offense into a spectrum of offenses, one distinguished from another only by different jurisdictional qualities, and then scatters them throughout the various provisions of Federal law. Thus, theft is currently split into theft of government property, theft of the mails, theft from interstate commerce, etc. The interpretation and application of multiple statutes inevitably result in inconsistencies, loopholes, and hypertechnicalities.

Not surprisingly, the absence of a general substantive reform has left us with complex, confusing and even conflicting laws and procedures that, all too frequently, have aggravated problems associated with rendering justice to the individual as well as to society. . . . Because of its lack of clarity, consistency, and comprehensiveness, [federal penal law] tends to undermine the very system of justice of which it is the foundation.

S. Rep. No. 605, 95th Cong., 1st Sess. 3, 4, 5, 6 (1977) (footnotes omitted). A similar criminal code reform bill was submitted by the current Administration, see Criminal Code Reform Act of 1981, S. 1630, 97th Cong., 1st Sess. (1981), and was favorably reported by the Senate Judiciary Committee with much the same introductory language. See S. Rep. No. 307, 97th Cong., 1st Sess. (1981).

<sup>41</sup> If the arson is to intimidate a witness, for example, 2J1.2(b)(1) applies (base offense level 12 + 8 levels for property destruction); if the same arson is to defraud an insurer, 2F1.1 applies (base offense level 6, with several specific aggravators); if the same arson is simply to destroy a building, 2K1.4 applies (base offense level 6, with several specific aggravators, all of which are different from the aggravators in 2F1.1).

Kidnapping, which is also punished under many different United States Code sections, is likewise covered under a number of different guidelines. If the kidnapping was for ransom, F.D. 2A4.1 applies (base offense level 24 with several specific aggravators); if the kidnapping occurred during a robbery, F.D. 2B3.1(b)(4) applies (base offense level

consolidation of offenses and reliance upon generic offense categories.

Overlapping sections are also common. Because of the overlap, consecutive sentences for multiple offenses by an offender are likely to punish an offender twice for some aspects of the criminal conduct, while concurrent sentences for the offender are likely to let some aspects—i.e., the unique portion of each overlapping offense—go unpunished. As long as the archaic federal criminal code provides the structural foundation for the guidelines, the problem of sentencing for multiple offenses will remain insoluble.<sup>42</sup>

## 2. The Failure to Reduce (and the Potential for Increasing) Unwarranted Sentencing Disparity

The Act seeks to promote greater consistency in sentencing by requiring comprehensive and binding guidelines. These guidelines, in contrast, are neither comprehensive nor binding. The guidelines ignore many factors important to sentencing, fail to provide a guideline for many offenses (including all offenses committed by organizations), frequently fail to provide definitions of terms and criteria for sentencing factors, and provide extensive invitations—indeed, directions—to judges to depart from the guidelines.<sup>43</sup> As a result, there may be as much disparity under these guidelines as there was without guidelines.<sup>44</sup>

10 + 4 levels for kidnapping; if the kidnapping occurred during the transportation of prostitutes, F.D. 2C1.1(b)(1) (base offense level 14) or F.D. 2C1.2(b)(1) applies (base offense level 16) (+ 4 levels for use of physical force or coercion by drugs); if the kidnapping occurs during a seamen riot, no guideline applies.

<sup>42</sup> One solution to the multiple offense problem is to base guidelines on the American Law Institute's Model Penal Code. Three weeks from today the country will celebrate the first quarter of a century of the Code, which generally consolidates and organizes offenses into generic, non-overlapping definitions. The Code represents a decade of work by the country's most distinguished judges, lawyers, and professors, as well as professionals from related criminal justice fields. Since its completion in 1962, the Code has been the basis for recodification of the criminal codes in over two-thirds of the states, yet these guidelines ignore the Code and the last twenty-five years of state experience in defining, refining, debating, and revising definitions of criminal conduct.

<sup>43</sup> Commissioner/Judge Stephen Breyer has championed what he calls the "minimalist" approach to guideline development. "You have to start slowly. One has to see how judges react to a system that doesn't limit discretion too closely but that gives guidance." Washington Post, Jan. 26, 1987, Section A, at 4, col. 1.

<sup>44</sup> Judge Gerald Heaney of the Eighth Circuit Court of Appeals had four of his chief probation officers test the Commission's previous draft. Based on their results, he concluded that "there will be as much disparity under the proposed guidelines as under the present [system]." Letter from Judge

Perhaps the most sobering fact is that even if sentencing disparity under the guidelines is no worse than the unacceptable level of the past, the result will be a net increase in actual disparity. The United States Parole Commission—the one source of consistency in the system today, albeit an inadequate one—will no longer be available to review and adjust the disparate sentences of the 1,042 judges and magistrates.

**Requiring Departures, and Thus Inviting Disparity, by Adopting Skeletal Rather than Comprehensive Guidelines.** The Sentencing Reform Act permits judges to depart from the guidelines only if the case contains a factor that was not adequately considered in drafting the guidelines. Thus, where a relevant factor is omitted, it creates the opportunity (indeed, the need) to depart from the guidelines. In other words, the less comprehensive the guidelines are, the less binding they are. For this reason, Congress mandated comprehensive guidelines.<sup>45</sup>

Heaney to Mike Murphy of the General Accounting Office (March 19, 1987) (encouraging the GAO to undertake extensive field-testing). The Probation Office in the Central District of California conducted a similar field-test on the Revised Guidelines. They concluded that:

[A]pplication of the guideline rules by different scorers result in markedly different sentencing ranges. Many key variables affecting the final offense level are open to subjective assessments that inevitably create this disparity. While the Courts need some room for discretion, the purpose of the guidelines are defeated when they allow for such wide interpretive differences.

Public comment letter on the Revised Draft from Nancy Reims, U.S. Probation Officer (March 16, 1987). (Copies of all public comment letters are available for inspection at the United States Sentencing Commission offices.) A similar conclusion was reached by probation officers in the Eastern District of Pennsylvania after their field-testing:

[T]he [Revised] guidelines are extremely flexible, and I could easily have come up with other sentence ranges by simply changing my subjective interpretation of certain key variables. . . .

[We] are concerned that [the Revised Draft] is not really a guideline system at all.

. . . [I]t appears to be a format we will henceforth apply to justify whatever sentence judges wish to impose.

Letter from Thomas Maher, Program Development Coordinator, to The Honorable Edward Becker, Third Circuit Court of Appeals (March 2, 1987).

The structure of the guidelines has changed significantly since the Revised Draft, but the sources of disparity have not. Since that draft, the wide ranges have been taken out, which avoids some disparity, but, in addition, many sentencing factors have been deleted, guidelines for many offenses have been deleted, the lack of definitions and criteria continues, the ambiguous provisions continue, and more frequent directions that departure is appropriate have been added (and departures are worse than wide ranges because they provide no limit on how far a judge can deviate from the guidelines).

<sup>45</sup> The guidelines are to "cover[] in one manner or another all important variations that commonly may

It specifically provided that the Sentencing Commission guidelines were to be more detailed than the existing Parole Commission guidelines,<sup>46</sup> yet they are not.<sup>47</sup> Skeletal guidelines that omit many relevant and commonplace factors violate the direction for binding guidelines as effectively as would the illegal 600% guideline ranges used in the Revised Draft.

Physical injury caused during the offense and the use of a weapon are just

be expected in criminal cases." S. Rep. No. 225 at 168. To accomplish this end, the Act specifically directs the Commission to consider the relevancy of an extensive but non-exclusive list of characteristics. Offense characteristics to be considered include: (1) The grade of the offense; (2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense; (3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust; (4) the community view of the gravity of the offense; (5) the public concern generated by the offense; (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and (7) the current incidence of the offense in the community and in the Nation as a whole. 28 U.S.C. 994(c). Offender characteristics to be considered include: (1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition, including drug dependence; (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood. 28 U.S.C. 994(d).

One federal judge observed that the above-listed factors gave the Commission "what appeared to me to be an exhaustive list of things to consider. I couldn't think of anything, myself, that wasn't on that list." Judge Mark Wolf, Testimony before the United States Sentencing Commission, Public Hearing, New York, New York, p. 45 (Oct. 21, 1986) (transcript available for inspection at the United States Sentencing Commission offices).

<sup>46</sup> The Senate Report directs that the guidelines "should contain recommendations of appropriate sentences for more detailed combinations of offense and offender characteristics than do the [United States Parole Commission] guidelines." S. Rep. No. 225 at 52 note 71. "[T]he result [of the Commission's work] will be sets of guidelines considerably more detailed than the existing parole guidelines." S. Rep. No. 225 at 168.

<sup>47</sup> In burglary offenses, for example, the Parole Commission's guidelines account for bodily injury caused; these guidelines do not. (Cf. 28 C.F.R. 2.20, section 211 to F.D. 2B2.1, 2B2.2.) In property damage offenses, the Parole Commission's guidelines consider injury to a victim and any significant interruption of a governmental function or public utility; these guidelines do not. (Cf. 28 C.F.R. 2.20, sections 303 (a) and (g) to F.D. 2B1.3.) In government bribery offenses, the Parole Commission's guidelines will reflect whether there is a pattern of corruption and whether there is injury beyond that describable by monetary gain; these guidelines do not. (Cf. 28 C.F.R. 2.20, sections 621 (b) and (d)(2) to F.D. 2C1.1.) In environmental offenses, the Parole Commission's guidelines take account of physical injury and death that result; these guidelines do not. (Cf. 28 C.F.R. 2.20, sections 1171 (a) and (b), 1172 (a)-(c) to F.D. Part Q.)

two examples of the many highly relevant and commonplace factors that are omitted from a majority of the offenses in which they occur, even though such factors were specifically recognized as relevant in earlier guideline drafts. Thus, where a burglar beats a homeowner or uses a gun during the burglary, for example, the court must depart from the guidelines to take account of these commonplace factors.<sup>48</sup>

Also commonly ignored is an offender's level of culpable state of mind—e.g., intentional, reckless, or negligent. The statutory definition of an offense generally requires a minimum level of culpability—recklessness (or negligence), for example—and the guidelines generally assume this level of culpability. Because the guidelines do not adjust for a higher level of culpability, the court must depart from the guidelines to account for an offender who intentionally commits the offense. Thus, the offender who intentionally burns a lumber-producing forest is treated the same as the camper who negligently fails to extinguish his campfire,<sup>49</sup> unless the court departs. An offender who knowingly sells misbranded poultry is treated the same as a brand manufacturer who negligently breaches a label regulation,<sup>50</sup> unless the court departs.

Besides general factors that are relevant to many offenses—e.g., physical injury, use of a weapon, or level of culpable state of mind—the judge must depart from the guidelines to take account of scores of more specific

factors that are both highly relevant and commonplace, many of which were specifically recognized in earlier guideline drafts<sup>51</sup> or were recognized by Congress in the definition of the offense.<sup>52</sup>

Also contrary to the legislative direction<sup>53</sup> and also likely to breed disparity is the guidelines' failure to provide a sentence for many significant offenses.<sup>54</sup> With no applicable

<sup>51</sup> The guidelines fail to aggravate a kidnapping when the offender risks his victim's death (cf. F.D. 2A4.1 to Tentative Draft Chapter 3, Section (1) (July 10, 1987) (unpublished) [hereinafter cited as "T.D."]); fail to aggravate a fraud offense when it endangers public health or safety (e.g., kickbacks for approving faulty bridge construction) (cf. F.D. 2F1.1 to Preliminary Draft F211a.6 [hereinafter cited as "P.D."]); fail to consistently adjust the seriousness of drug offenses according to the level of purity (cf. F.D. 2D1.1 to T.D. Chapter 2, Section (4), Subsection D); and fail to aggravate a sentence for child pornography when violence is depicted, when force or a drug is employed to exploit the child, when the child is sexually abused (cf. F.D. 2G2.1 to P.D. E261b.4); or when committed for a commercial purpose (cf. F.D. 2G2.1 to P.D. E241a.1). Each of these factors was recognized as relevant in a previous draft.

Similarly, the guidelines fail to aggravate a rape committed in the victim's home, committed by multiple perpetrators (cf. F.D. 2A3.1 to R.D. A231(4)), involving acts of perversion (cf. F.D. 2A3.1 to R.D. A231(5)), or causing extreme psychological injury (cf. F.D. 5K2.3 to R.D. Y222); fail to aggravate property offenses when the significance of the property is other than its monetary value (cf. F.D. 2B1.1 to T.D. Chapter 2, Section (3), Subsection (H) (e.g., minor damage to telephone lines that cause an extended loss of service); fail to aggravate a loansharking offense when the property of the victim is destroyed or damaged (cf. F.D. 2E2.1 to P.D. E221b.3); fail to aggravate the sentence for possession of a serious drug when the offender possesses a weapon (cf. F.D. 5K2.6 to R.D. Y226).

<sup>52</sup> From the Final Draft, cf. 2N1.1 (tampering or attempting to tamper with consumer products) to 18 U.S.C. 1365(a); 2B2.1 (burglary of a residence) and 2B2.2 (burglary of other structures) to 18 U.S.C. 2118(b); 2B1.3 (property damage or destruction other than by arson or explosives) to 18 U.S.C. 1362, 1363; 2A5.2 (interference with flight crew member or attendant) to 49 U.S.C. 1472(j); 2M6.1 (unlawful acquisition, alteration, use, transfer, or possession of nuclear material, weapons or facilities) to 18 U.S.C. 831(b)(1)(B)(i); and 2P1.1 (instigating or assisting escape) to 18 U.S.C. 755.

<sup>53</sup> The legislative history specifically notes the two instances in which there might not be a guideline for an offense: "where there is a new law for which no guideline has yet been developed and where an appellate court had invalidated the established guideline and no replacement had yet been determined." S. Rep. No. 225 at 153. Thus, except for these two instances, the Sentencing Reform Act appears to contemplate guidelines for all federal offenses.

<sup>54</sup> The final guidelines dropped many offenses from the previous Revised Draft, including, for example, such offenses as unsafe consumer products (N232); violent rebellion or insurrection (M213); failure to register as an agent of a foreign principal or government (M262); engaging in prostitution (G212); unlawfully possessing an explosive in a government building (K215); prohibited financial transactions with foreign governments during a national emergency (M252); misbranding or mislabeling consumer products (N231); and interference with the recapture of special nuclear material, entry, or operation orders during time of war or national emergency (M273).

guidelines, judges are free to give any sentence that they feel is appropriate, with no limitation on their exercise of discretion other than the statutory maximum.<sup>55</sup>

**Fostering Departures, and Thereby Disparity, by Using Value and Ambiguous Standards.** Even where a guideline is provided and relevant factors are included, criteria for application of the factor is frequently missing, key terms are commonly left undefined, and ambiguous provisions frequently leave judges to guess at their meaning. This fosters disparity. For example, where there is no guideline for an offense the court is told to apply the "most analogous" guideline;<sup>56</sup> and "[i]f

Other examples of offenses found in the Revised Draft that have been omitted from the guidelines include: interstate transportation of strikebreakers (E260); failure to register of a person who has knowledge of or has received instruction or assignment in espionage, counter-espionage, or sabotage services or tactics of a foreign government (M265); interfering with a federal benefit for a political purpose (H222); neglect or refusal to answer subpoena for naturalization hearing (L226); conduct impairing military effectiveness (M241); prohibited financial transactions with foreign governments (M251); United States government officers and employees acting as agents of foreign principals (M261); possession of property in aid of a foreign government (M263); failure to register of an organization subject to foreign control and engaged in political activity or civilian military activity (M264); and failure to file political propaganda (M266).

<sup>55</sup> It has been suggested that guidelines for these and other offenses are not now necessary because such offenses are infrequently prosecuted. But the less-frequent offenses may be the offenses for which judges have the greatest need for sentencing guidance. The less frequently an offense occurs, the less likely it is that the judge will be familiar with any special sentencing considerations of the offense, and the less likely it is that the judge will know what sentence other judges commonly give. The potential for the disparity may increase dramatically with decrease in frequency.

Further, many of the omitted offenses have not been prosecuted because the prosecutor has not been assured that upon conviction the resulting sanction would justify the costs and time needed for the prosecution. See, e.g., Letter from Henry Habicht, Department of Justice, to Commission Chairman William Wilkins (April 7, 1987) (urging the Commission not to delete guidelines for two offenses in the environmental section). Promulgating a guideline for an offense frequently may provide the certainty of sanction that will justify increased prosecution of the offense.

Still further, the failure to provide a guideline for offenses—thereby creating "guideline-free" offenses—provides another ready mechanism by which parties can avoid the guidelines' sentences, i.e., by pleading to one of the guideline-free offenses. For example, offenders charged with tampering with consumer products can avoid the guidelines by pleading to misbranding consumer products; those charged with transporting for purposes of prostitution can avoid the guidelines by pleading to engaging in prostitution; a corrections official charged with instigating or assisting escape can plead to negligently permitting escape; and so on. "Statute shopping" may replace "judge shopping."

<sup>56</sup> See F.D. 2X5.1.

<sup>48</sup> The court must depart from the guidelines to take account of physical injury caused during such offenses as burglary, see F.D. 2B2.1 (burglary of a residence), F.D. 2B2.2 (burglary of other structures), escape (see F.D. 2P1.1), prison riot (see F.D. 2P1.3), tampering with consumer products (see F.D. 2N1.1), aircraft piracy (see F.D. 2A5.1), transportation of a minor for purposes of prostitution (see F.D. 2G1.2), sexual exploitation of a minor (see F.D. 2G2.1), mishandling of toxic substances (see F.D. 2Q1.2), abusive sexual contact (see F.D. 2A3.4), and operation of a common carrier under the influence of drugs (see F.D. 2D2.3). Similarly, the court must depart from the guidelines if the use of a weapon is to be taken into account when used in the course of interference with a flight crew (see F.D. 2A5.2), obstruction of justice (see F.D. 2J1.2), inciting a prison riot (see F.D. 2P1.3), burglary (see F.D. 2B2.1(b)(4) (burglary of a residence), F.D. 2B2.2(b)(4) (burglary of other structures) (Possession of a weapon will aggravate the burglary in both guidelines by two levels, but use of the weapon is given no greater aggravation than the simple possession), smuggling an alien (see F.D. 2L1.1), or conspiracy to interfere with civil rights (see F.D. 2F1.2) (no aggravation unless the guideline for the underlying offense contained a specific aggravation for use of a weapon).

<sup>49</sup> For both offenders, see F.D. 2K1.4 (arson, base offense level 6, 0-6 months).

<sup>50</sup> For both offenders, see F.D. 2N2.1 (violations of statutes and regulations dealing with any food product, base offense level 6, 0-6 months).

no sufficiently analogous guideline exists, the court may impose any sentence that is reasonable . . . ." <sup>57</sup> The court may accept a plea-bargained sentence that is outside of the guidelines if it has "justifiable reasons." <sup>58</sup> Multiple offenses are treated as a single offense, with a sanction equal to that for the most serious of the offenses, if they constitute part of a "common scheme or plan." <sup>59</sup> Each instance creates the opportunity for different judges to supply their own criteria, definitions, and interpretations of key provisions, and thus generate different sentences for similar cases. <sup>60</sup>

This systemic vagueness is particularly troublesome in the absence of a sentencing policy. Without an articulated policy, each judge is left to use his or her own personal sentencing philosophy in interpreting and applying these vague terms. The effects of differing philosophies are a major source of disparity today; <sup>61</sup> there seems little reason to think that disparity will not continue.

**Fostering Disparity by Inviting (and Directing) Extensive Departures Without Providing the Guidance of an Articulated Sentencing Policy.** As if the skeletal and vague nature of the system were not enough, in over a hundred instances the guidelines specifically invite (and in some cases direct) the court to depart. <sup>62</sup> This not only invites disparity but also contravenes the Act. The conditions triggering each departure were obviously foreseen and fully "considered" by the Commission, thus the only lawful ground for departure—that the factor was *not* adequately considered by the Commission—is inapplicable.

For some offenses, the conditions for departure are so numerous and broad that one is hard-pressed to think of a case that would not fall under at least one of the conditions described in the commentary. <sup>63</sup> In other instances, the

guidelines describe entire classes of cases where departure is invited, including cases where the offense involves, but the guideline for the offense does not specifically address, for example, the disruption of a governmental function, <sup>64</sup> the endangering of public welfare, <sup>65</sup> the commission of the offense to facilitate another offense, <sup>66</sup> extreme psychological injury, <sup>67</sup> or property damage or loss. <sup>68</sup> A judge is similarly invited to depart when, after calculating an offender's criminal history category, he concludes that the category does not "adequately reflect" the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes. <sup>69</sup>

Once a judge is invited or directed to depart from the guidelines, there is no legal limit, other than the statutory maximum, to the sentence the judge may give. Thus, in each of the departure instances described above, one judge may choose not to depart, another may choose to exceed the guideline slightly, and another may choose to exceed it dramatically. A sentencing system premised upon such broad departure conditions was never contemplated by the Sentencing Reform Act. <sup>70</sup> Departure from the guidelines was intended only for rare or unforeseeable cases. Instead, these guidelines invite departure for the predictable and the commonplace.

The likelihood of unwarranted disparity under such a "departure system" of sentencing is dramatically increased by the guidelines' lack of a coherent sentencing policy. As Senator Edward Kennedy has noted, one of the major sources of unwarranted sentencing disparity is that, "[o]ne judge

potential conduct arising out of the handling of different quantities of materials with widely differing propensities, a departure either upward or downward may be warranted. Depending upon the resulting harm from the emission, release or discharge, the quality and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction . . . may be appropriate."

<sup>57</sup> See commentary to F.D. 2X5.1.

<sup>58</sup> See F.D. 6B1.2(b)(2).

<sup>59</sup> See F.D. 3D1.2(b).

<sup>60</sup> Other examples of ambiguous and undefined terms and phrases in the Final Draft include: "more than minimal planning" (2A2.2(b)(1), 2B2.1(b)(1), 2B2.2(b)(1), 2E5.2(b)(1), 2E5.4(b)(1), 2F1.1(b)(2)(A)); "actual or planned harm to the government" (2C1.3(b)(1)); "substantial expenditure" (2Q1.2(b)(3)); "sophisticated means" (2T1.1(b)(2)); "commercial" vs. "non-commercial gambling offenses" (commentary to 2E3.3(b)(1)); "intentionally" and "recklessly endangered" (2A5.2(a)(1) and (a)(2)); "victim's unusual vulnerability" (3A1.1); "mere negligence" (2K1.5(b)(1)(C)); and "booby trap" (commentary to 2D1.9).

<sup>61</sup> See notes 71-72 and accompanying text *infra*.

<sup>62</sup> A complete list of departures is available upon request.

<sup>63</sup> See, e.g., commentary to F.D. 2Q1.2(b)(1) and F.D. 2Q1.3(b)(1): "Because of the wide range of

may sentence in order to rehabilitate, another to deter the offender or the potential offender from committing a similar crime, a third to incapacitate, while a fourth may sentence simply to 'punish.' " <sup>71</sup> By refusing to resolve the issue of competing sentencing policies, and yet providing broad judicial discretion to depart, the guidelines continue and enhance the existing conditions that lead to the unwarranted disparity that Senator Kennedy and others have warned against. <sup>72</sup>

### 3. The Failure To Prevent Plea-Bargaining From Subverting the Goals of the Guideline System

In addition to the guidelines' numerous directions to depart and the broad categories of departures, the judges are told that they need not follow the guidelines whenever the sentence is pursuant to a plea bargain, not an uncommon occurrence. This single invitation to depart, as a practical matter, may swallow the entire guidelines. It gives the judge and the counsel a ready means to routinely avoid the guideline sentences. Because 87% of all criminal cases in the federal system last year were disposed of through a plea bargain, <sup>73</sup> it is likely that

<sup>71</sup> Kennedy, Foreword to P. O'Donnell, M. Churgin, D. Curtis, *Toward a Just and Effective Sentencing System* at viii (1977). The Canadian Sentencing Commission makes the same point:

[J]udges approach similar cases in different ways. These different approaches to cases—based on different views of what [sentencing] principles should be paramount—lead to different sentences being handed down for similar offences committed by similar offenders in similar circumstances.

Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* xxiii (February 1987) [hereinafter cited as *Report of the Canadian Sentencing Commission*].

<sup>72</sup> The literature on sentencing reform is replete with references to the relationship between sentencing purposes and disparity. For example, in discussing the development of its guidelines, the Minnesota Sentencing Commission describes the effects of having no articulated sentencing policy:

[T]he same case, heard in two different courts, could receive very different sentences simply because each court emphasized different sentencing goals. The pursuit of multiple goals contributed significantly to the problem of sentencing variation. The outcome of the sentencing system often appeared irrational, in that an emphasis on one goal, such as rehabilitation, might lead to a sentence that was indefensible on retributive grounds, and with limited standards to determine which goal to emphasize, sentences appeared to be highly inequitable.

Minnesota Sentencing Guidelines Commission, *The Impact of the Minnesota Sentencing Guidelines: Three Year Evaluation* 11 (September, 1984).

<sup>73</sup> See note 1 *supra*. If the parties can avoid the guideline sentence by a plea bargain that includes a specific sentence recommendation, there will be great pressure to bargain for just such recommendations.

this provision will be the only "guideline" applicable to the overwhelming majority of sentences.

But this departure provision, like many of the invitations to depart in the guidelines, may be illegal. The statute simply does not permit judges to depart from the guidelines for "justifiable reasons" if the sentence is pursuant to a plea-bargain. The Act is explicit on this point:

The court shall impose a sentence of the kind, and within the range, referred to in [the guidelines] unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. . . .<sup>74</sup>

It is not enough that the court feels that there are "justifiable reasons" to depart.

#### 4. Impeding Future Refinement

These skeletal non-binding guidelines will not provide a basis for future refinement. In fact, in most respects, the guidelines seem calculated to frustrate any meaningful improvement over time.

**The Failure to Provide an Adequate Foundation for Refinement.** I have described above the lack of sentencing policy and principled rationales, the unwieldy and illogical structure of the guidelines, and the reliance on the fragmented and overlapping offense definitions of the antiquated federal code. Each of these fundamental flaws will remain, no matter how long the current guidelines are in effect. They each render the current guidelines inadequate as a foundation for future refinement.

**The Impropriety of Relying on the Courts to Develop the Guidelines.** These guidelines leave to the courts the task of providing the substance and direction that the guidelines lack. The courts will be called upon to provide the missing criteria, the missing definitions, the standards for determining when and how much of a departure from the guidelines is appropriate.<sup>75</sup> Many of the judges who appeared before the Commission, as well as judges on the Commission, appear to prefer just such a process, in which the courts would effectively be left to write the sentencing guidelines.<sup>76</sup>

Why do I oppose having the courts write the guidelines? It is certainly not because I doubt the abilities of federal judges. On the contrary, the judges who sit on the Commission, appeared before the Commission, or otherwise offered comments on the problems of criminal sentencing, have been knowledgeable and sincere. Most have a certain sentencing "wisdom" that comes with experience. I remain opposed to judicial guideline development, however, for three primary reasons.

First, the judiciary as an institution has a limited ability to properly perform the task. The nature of the judicial process would necessarily compel a piece-meal approach; a court can create or alter the sentencing system only through deciding the case immediately before it. An effective and rational system requires a systemic perspective. Different parts of the system necessarily interact: a change here has implications there and there, and may require an adjustment there and elsewhere. A proper ranking of offense seriousness, for example, must necessarily be done by a single body and requires a comparison to all offenses. Delegating guideline decision-making to judges, who operate of necessity on a case-by-case basis, precludes systematic ranking. Nor can policy decision-making by courts be guided by empirical studies and analysis, for these are not within the authority or means of a judge in deciding the individual case before the court.<sup>77</sup>

As a recent Canadian report notes:

Courts are primarily a reactive institution. They cannot initiate policy and must solve problems as they arise. Other policy-making bodies like Commissions are not hampered by this inherent constraint. They can make policy with a view to the future, not only in response to the past.

The Report adds:

To expect that a uniform approach to sentencing can be developed with clarity and consistency by ten different

The courts of appeals are going to pass on these guidelines, and they're going to write them and rewrite them, just as they've done [in] every state, and we're not going to have to correct all the problems. They can work out a lot of the constitutional problems, or anything else.

Meeting of the United States Sentencing Commission of April 28, 1987, transcript of tape 1, side B.

<sup>77</sup> The drafting of the final guidelines may well manifest the normal "judicial method" decision-making in which other parties have the responsibility for developing the relevant information and arguments. The court's role is to make decisions, not to organize the decision-making process.

courts is to over-simplify the complexity of the task of sentencing.<sup>78</sup>

A second reason to oppose judicial development of guidelines is that the judiciary as an institution does not appear to have the desire to reduce the sentencing discretion of judges; yet, reducing discretion is the linchpin upon which greater sentencing consistency hinges. The history of federal sentencing shows a strong judicial tendency to maximize judicial discretion. It was not the Judicial Conference but Congress that finally stepped in to address the problem of unwarranted disparity among judges; indeed, the judiciary generally opposed the Sentencing Reform Act.<sup>79</sup> And, as was apparent from testimony before the Commission, many judges continue to oppose the Act today.<sup>80</sup>

<sup>78</sup> Report of the Canadian Sentencing Commission at 85.

<sup>79</sup> See, e.g., Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 638, 640 (1983) (testimony of the Honorable Gerald Tjoflat, U.S. Circuit Judge, Eleventh Circuit, and Chairman, Committee on the Administration of the Probation System, Judicial Conference of the United States), id. at 1151, 1155 (statement of the Honorable Jean Dwyer, United States Magistrate, and Chairman, Standing Committee on Sentencing, National Council of the United States Magistrates); Bazelon, Missed Opportunities in Sentencing Reform, 7 Hofstra L. Rev. 57 (1978) (U.S. Circuit Judge, District of Columbia). There were and are, however, some notable exceptions to the judicial opposition to sentencing guidelines that reduce judicial discretion. See, e.g., Frankel, Criminal Sentences (1973) (former district judge, Southern District of New York); Lasker, Presumption Against Incarceration, 7 Hofstra L. Rev. 407 (1979) (district judge, Southern District of New York); Tyler, Sentencing Guidelines: Control of Discretion in Federal Sentencing, 7 Hofstra L. Rev. 11 (1978) (former district judge, Southern District of New York); Newman, A Better Way to Sentence Criminals, 63 A.B.A.J. 1562 (1977) (U.S. Circuit Judge, Second Circuit).

<sup>80</sup> See, e.g., Judge Jack Weinstein, Testimony before the United States Sentencing Commission, Public Hearing, New York, New York, pp. 34-35 (Oct. 21, 1986) (transcript available for inspection at the United States Sentencing Commission offices):

I see no objection to telling Congress in a preliminary report: "Ladies and gentlemen, we [the Sentencing Commission] cannot [draft sentencing guidelines] until we have a rational scheme of statutes and until you give us a certain degree of play. Congress may well have made a mistake, and [our attempting the task gives] us the wisdom to make a suggestion for the modification of the statute."

You know, I found that in World War II that when a soldier is ordered to shoot somebody that should not be shot, there is the possibility, in extreme circumstances, of turning around and saying, "Don't you think you ought to think about it, Lieutenant, before you order me in there to shoot?" I think maybe you ought to do that to Congress.

See also Testimony of Judge Mark Wolf, id. at 62 ("I think Congress had goals and they thought this [the Sentencing Reform Act of 1984] would be a means to achieve those goals. But if the intense

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<sup>74</sup> 18 U.S.C. 3553(b) (emphasis added).

<sup>75</sup> On the other hand, some people argue that the lack of criteria in the guidelines makes it difficult for an appellate court to review (and overturn) the sentence of a lower court. Similarly, this same lack of standards will make it difficult to monitor the application of the guidelines. Both of these considerations, if true, increase the likelihood that the current guidelines will not be improved.

<sup>76</sup> As one judge envisions:

A final reason to oppose judicial development of guidelines is that Congress has provided that the task is to be performed by this Commission. It could have provided for judicial guideline-development but did not.<sup>81</sup> Congress may have recognized that the judiciary does not possess the resources to address successfully the problem of disparity, that its decentralized structure makes concerted reform difficult, or that the natural tendency to preserve judicial discretion is particularly strong in an area with such a history of unfettered discretion. Whatever the reasons, the courts cannot and should not be allowed to do what Congress has directed this Commission to do.

**The Failure to Permit Adequate Appellate Review.** The guideline drafters assume that appellate review of departures will, over time, permit the courts to develop a "common law" of sentencing that will provide the substance and direction that the guidelines currently lack. Even if this were desirable, which I argue above it is not, it is not practical. The commentary rarely describes with sufficient detail the factors that have been assumed when a base offense seriousness level was set. Thus, judges have little basis for judging whether the case at hand was intended to come within the guideline or whether it was intended as an appropriate case for departure. Does the base offense level for kidnapping assume that some bodily injury was caused? What size of operation is assumed in the base offense level for engaging in a gambling business? What size operation is assumed for loansharking? Because the commentary gives no answers to these questions,<sup>82</sup> and most other questions like them,<sup>83</sup>

scrutiny, and really in many respects, I think, brilliant analysis, indicates that in effect mandatory sentencing is not the right way, the best way, to approach those goals, but an effective presumptive sentencing would be. I myself would think that the sponsors of the original legislation would be quite responsive to you [the Commission] and that their colleagues, too, would be responsive."

<sup>81</sup> As the legislative history notes:

It is clearly intended that judges will confine their exercise of discretion to choosing a point within the range (if any) specified in the applicable guideline. Thus, the Sentencing Reform Act really vests most of the sentencing discretion in the United States Sentencing Commission, the body responsible for drafting the sentencing guidelines.

H.R. Rep. No. 614, 99th Cong., 2d Sess. 2-3 (1986) (footnotes omitted)

<sup>82</sup> See commentary to F.D. 2A4.1 (kidnapping), 2E3.1 (engaging in a gambling business), and 2E2.1 (loansharking).

<sup>83</sup> One need only skim the commentary to see that there is rarely guidance to what is included in the base offense levels.

neither the sentencing judge nor an appellate court can divine what was intended to be inside the guidelines and what outside.

More importantly, because the guidelines fail to articulate a coherent sentencing policy on how the statutory purposes of sentencing are to be achieved, the appellate courts have no touchstone from which they can rationally and consistently interpret vague guideline provisions, provide missing criteria for application, or review whether a sentencing judge's departure was appropriate.

A further serious limitation on the effectiveness of appellate review arises from these guidelines' treatment of plea-bargained sentences. Because there is typically no appeal in plea-bargain cases,<sup>84</sup> there will be no appellate review of what may represent the vast majority of departures—sentences pursuant to a plea-bargain.

The sixty years of Canadian experience with appellate review of criminal sentences is instructive. The recent official Canadian report concludes that the appellate courts have had little impact in reducing unwarranted sentencing disparity:

Since appellate review of the fairness of sentences began in 1921, volumes have been filled with case law on sentencing, but by and large the principles that have been established are general in nature and have neither served as a structure for, nor limit upon, the vast discretion bestowed upon the sentencing judge.

It is not that Courts of Appeal, or trial courts, never state the principles underlying their approach to sentencing, it is that they do it infrequently and when they state these aims, the practice of blending and balancing results more in obscuring their approach than in developing a uniform approach to sentencing aims. . . .

The individual judge's approach to the aims of sentencing thus has far-reaching implications for the sentence he or she will impose. To date, the Courts of Appeal have not issued judgments resulting in any kind of uniformity of approach to the general principles of sentencing in Canada. . . .<sup>85</sup>

<sup>84</sup> A defendant generally will agree to a plea-bargain that contains a specific sentence or sentence recommendation only if the sentence is below the guideline range—in which case, the government has waived its right to appeal the sentence by entering into the plea-bargain—or within the guideline range—where neither party has a right to appeal.

<sup>85</sup> Report of the Canadian Sentencing Commission at 79-81.

## 5. The Failure to Provide an Impact Assessment

Responsible decision-making requires that, before the guidelines are promulgated, one should consider reliable projections as to the most significant aspects of the operation and effects of the guidelines. Unfortunately, these guidelines were drafted and promulgated with little knowledge of their likely operation and effect.

What percentage of cases are appropriately departures from these guidelines? At what rate will judges depart? How often will judges fail to depart (i.e., will they follow the guidelines) when the guidelines invite, direct, or expect them to depart?

How often will sentencing hearings be required? How time-consuming is a sentencing hearing likely to be? What additional investigative resources will be required? How much more time for application of the guidelines will be required of probation officers, of judges, of prosecutors and defense counsel? What will be the effect on the rate of plea bargains and thus the rate of jury trials? What will be the effect on requirements for prison capacity and probation services?

Will the guideline sentences correspond to the community's views of the relative seriousness of offenses? Will the guidelines provide greater, or as much, deterrence of potential offenders as current practice? Will they be more effective, or as effective, in identifying dangerous offenders?

Will similar offenders committing similar offenses receive similar sentences regardless of the identity of the judge or counsel? How much disparity will continue to exist under the guidelines because of differences in judges' sentencing philosophy, because of differences in the interpretation of guideline provisions, because of the lack of guidelines for some offenses, because of the lack of definitions or criteria in the guidelines?

Careful decision-making and field-testing could have provided an informed estimate on each of these important issues.

To add to the uncertainties, and the potentially damaging consequences, is the likelihood that one or another aspect of the guidelines will be held illegal. For example, are the frequent "invited" departures appearing throughout the guidelines lawful under the Sentencing Reform Act? Are "directed" departures permitted?<sup>86</sup> If a judge follows an

<sup>86</sup> Examples of "directed" departures in the Final Draft are found in the commentary to 2B1.3

Continued

invitation or direction to depart, is the sentence subject to appellate review because it is a deviation from the guidelines? Or, is the sentence free from appellate review because the sentence is precisely what the guidelines invite or direct?

The status of the "guidelines to go outside the guidelines" is further complicated by the attempt to regulate judges after they accept the invitation to depart. The *extent* of the permissible "departure" may be limited, for example, to "not more than four levels."<sup>87</sup> One may wonder how such a "departure range" is different from a "guideline range" of four levels, which is illegal.<sup>88</sup> By calling a guideline directive a "departure" (a term that does not appear in the Sentencing Reform Act), can the guidelines escape the 25% statutory limitation on the permissible width of their ranges?

Other potential illegalities already discussed include, for example, the multiple-offenses provision, which fails to provide the incremental penalty that the Sentencing Reform Act requires, and the attempt to authorize guideline departures for sentences pursuant to a plea-bargain if the judge feels there is a "justifiable reason."

Whether or not the guidelines are ultimately upheld against most challenges, consider the consequences if any one of these illegalities is found to exist. Will the sentences under the guidelines to date be held invalid? Will those offenders sentenced to date have to be released pending resentencing? Will the resentencing have to await Commission revision of the guidelines in light of the illegality? Will this revision require the normal delay for "public-notice and comment"? Will the effective date of the revision be subject to the normal six month delay period to allow Congressional review? Will the Parole

Commission have to be judicially reinstated to cover the offenders for which the guidelines are held invalid? If invalidated in one court, will the guidelines remain applicable in another court in the same district? If invalidated in one district, will they remain applicable to other districts in the same circuit?

Even if the likelihood of invalidation of the sentences under the guidelines were small (which I do not believe it is), the potential consequences of such a finding, even by a single judge, should be sufficiently troublesome that it would seem prudent to avoid the provisions of most questionable validity, such as those providing broad invitations to depart. Letting these guidelines go into effect is a jump into the unknown, where what we do not know can hurt us.

#### 6. The Fundamental Failure of the Process

Many of the policy and drafting difficulties noted here stem from a flawed policy-making process. A process of informed policy-making and thoughtful drafting might have taken the following course: isolation of the significant issues, staff preparation of background research papers on each of the issues, discussion and debate of each background paper to identify the most likely resolutions of each issue, staff preparation of option papers on the advantages and disadvantages of each possible resolution, discussion and debate of each option, a vote and tentative resolution of each issue, drafting a guideline system that embodies each of the options tentatively selected, re-evaluation of the tentative resolutions after their integration into a single guideline system, clinical testing of the revised document, revision in light of the clinical testing, limited field-testing of the revised document, revision in light of the limited field-testing, full field-testing during a period when the guidelines would be only advisory (including orientation and training programs for judges, probation officers, prosecutors, and defense counsel), and final revision in light of the full field-testing. Except for the field-testing, which can be time-consuming, each of these steps could have been feasibly accomplished in a month or two.

Unfortunately, neither this nor any other long-range working agenda was adopted. Early attempts to isolate critical issues, to prepare issue background papers, to draw from the available empirical literature on deterrence and incapacitation, to assess public perceptions of offense seriousness, and to rank offense

seriousness, were quickly abandoned. In their place was substituted what many like to call an "evolutionary" process of guideline drafting. Too often, this process meant that a draft section would be produced by a staff member with little information about what other staff members were drafting and without policy guidance. These sections would then be collected, pressed into a common format, and called "draft guidelines." Then, without a background briefing or memorandum on the relevant issues, and without hearing from and frequently without knowing the identity of the author, the Commissioners would be asked if they wanted to suggest specific changes to the "draft guidelines." The process was thus a purely reactive one—reacting to a proposed draft, or to criticisms of another Commissioner or to criticisms made by individuals or organizations during a "public comment period." Unfortunately, there was never a "guideline planning period" or a "policy development period."

It was to avoid this sort of reactive drafting—which is sometimes more sensitive to the political influence of complaining parties than to the merits of their objections—that Congress chose to have the guidelines drafted by an independent commission in the Judicial Branch rather than by one of its own committees. If the process were to have been purely reactive and political, it would not have required an independent Commission.

With regard to field-testing, the record is equally troubling. Despite general agreement that field-testing is necessary,<sup>89</sup> these guidelines have never been tested in the field or elsewhere.

The result of the flawed policy-making process became painfully obvious to those who followed the stages of guideline drafting. Without defensible bases for a particular structure, approach, or position, the successive drafts lurched from one extreme to another as each was criticized for its obvious shortcomings. The Preliminary

<sup>89</sup> Many observers have suggested that field-testing its guidelines is one of the most important exercises the Commission could conduct. Most of the public comment letters on the Revised Draft collected at note 91 *infra* propose a delay in the submission and/or the effective date of the guidelines and also urge field-testing. See also Letter from Judge Jon Newman, Second Circuit Court of Appeals, to Commission Chairman William Wilkins (Oct. 16, 1986); additional public comment letters on the Revised Draft from Judge George Arceneaux, Jr.; Judge Elizabeth Kovachevich; William Graves, Chief Probation Officer, District of Colorado; Professor Daniel Freed; and Tommaso Rendino, President, Federal Probation Officers Association.

(property damage or destruction other than by arson or explosives), 2D1.1 (drug trafficking), and 2C1.1 (offering, giving, soliciting, or receiving a bribe). Indeed, there is some suggestion that all specific invitations to depart are in fact "directed" departures. Judges are told, as one of the steps in applying the guidelines in each case, that "[t]he court shall determine any applicable . . . departure from the guidelines." F.D. 1B1.2(b).

<sup>87</sup> Examples of "limited" departures in the Final Draft are found in the commentary to 2A1.1 (-10 levels), 2G1.1 (-8 levels), 2Q1.2(b)(2) and 2Q1.3(b)(2) (+ or - 3 levels), 2Q1.2(b)(3) and 2Q1.3(b)(3) (+ or - 2 levels), 2Q1.2(b)(4) and 2Q1.3(b)(4) (+ or - 2 levels), 4A1.3 (+ or - one criminal history category); 4B1.3 (increase to level 13 if not already greater); 3E1.1(a)(2) (-2 levels).

<sup>88</sup> See 28 U.S.C. 994(b)(2). Subsequent legislation amended 28 U.S.C. 994(b) to allow for a range of "the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment." Sentencing Guidelines Act of 1986, Pub. L. No. 99-363, section 2, 100 Stat. 770 (1986).

Draft provided great detail within each specific offense guideline and little discretion; the Revised Draft represented the other extreme by providing general principles to adjust the seriousness value of an offense and extremely broad discretion. Within the last few weeks, the guidelines were redrafted along yet another approach—using narrow guidelines without general principles of adjustment but with broad invitations to depart.

An "evolutionary" style of drafting can, I fear, be a euphemism for haphazard and unsystematic drafting. In this instance, unfortunately, it has resulted in guidelines of a similar character.<sup>90</sup>

<sup>90</sup> One may wonder, for example, why a prior offense should aggravate an offender's current sentence more than if the same offense were committed as part of the current offense. Or, one may wonder why the same use of a weapon should be treated differently in each of the many guidelines in which it appears.

As to the effect of prior vs. current offenses, if a defendant served 14 months for robbery 14 years ago, it can increase his sentence for his present offense (rape causing serious bodily injury) by 34 months. See F.D. 2A3.1 (base offense level 27), 2A3.1(b)(4)(B) (+2 levels) [Total = offense level 29], 4A1.1(a) (+3 points for sentence exceeding one year and one month = Criminal History Category II, 97–121 months vs. a Criminal History Category I sentence of 87–108 months). If he had committed the robbery during the current offense, however, it would not increase his sentence at all under the guidelines. See F.D. 3D1.2(a) and 3D1.3(a), which provide that the offense level applicable to the most serious of the counts in the group is the applicable offense level. If three years ago, a defendant was sentenced to 14 months for counterfeiting \$25,000, it could increase his current sentence (counterfeiting \$25,000) by an additional 9 months. See F.D. 2B5.1 (base offense level 9), 2B5.1(b)(1) (+4 levels) [Total = offense level 13], 4A1.1(a) (+3 points for sentence exceeding one year and one month = Criminal History Category II, 15–21 months vs. a Criminal History Category I sentence of 12–18 months). If his present offense includes two counts of counterfeiting \$50,000 on two different occasions, his sentence would not be increased at all. See F.D. 3D1.2(d), which provides that the amounts be aggregated.

As to the erratic treatment of use of a weapon, note that, for example, in the two most serious assault offenses, the discharge of a gun will increase the offender's sentence by five levels (see F.D. 2A2.1(b)(2) (assault with intent to commit murder), F.D. 2A2.2(b)(2) (aggravated assault)), while the same discharge of a weapon in a kidnapping offense will increase the offender's sentence by only two levels (see F.D. 2A4.1(b)(3)). In a burglary offense, in contrast, the offender's sentence will be increased by two levels for the mere possession of a gun (see F.D. 2B2.1(b)(4)). Other offenses provide no aggravation for the use of a gun. See text accompanying notes 46–52 *supra*. Thus, the judge may ignore the use of a weapon, or the judge may depart from the guidelines and aggravate the sentence by any number of levels. Similarly, in a robbery offense, causing permanent bodily injury counts 6 levels (see F.D. 2B3.1(b)(3)(C)), unless caused by discharge of a gun when it counts only 4 levels (see F.D. 2B3.1(b)(2)(B)). Thus, serious bodily injury and permanent bodily injury during a robbery count the same if a gun is used. If a gun is not used, permanent bodily injury counts more.

## Conclusion: What Should We Do Now?

I urge Congress to disapprove these guidelines and to direct the Commission to restart its work.<sup>91</sup> In addition, Congress should resolve the lingering questions of unconstitutionality,<sup>92</sup> even

<sup>91</sup> The Commission has voted unanimously to ask Congress for a nine-month extension. I applaud the Commission for its action, and urge Congress to pay due deference to those in a position to know whether these guidelines are ready to go into effect. I have some concern, however, that the nine months requested by the Commission is not enough time. As noted above, I believe the basic structure of these guidelines is sufficiently flawed that it cannot provide an adequate foundation for future "refinement;" it must be redone. And, I believe that a thoughtful and systematic process of policy development should be undertaken. I urge the Congress to give the Commission more than nine months to reattempt its historic, visionary task.

Many observers, for many different reasons, support the idea of delaying the submission or the effective date of the guidelines. See, e.g., public comment letters from Daniel Van Ness, President, Justice Fellowship; Judge John Sprizzo; Judge Barbara Crabb; John Kramer, Executive Director, Pennsylvania Commission on Sentencing; Judge Alan Nevas; Joint Statement of the District Judges of the Second Circuit; Judge Jack Weinstein; Randolph Stone, Deputy Director, Public Defender Service for the District of Columbia; Judge Gerald Heaney; Professor Stephen Schulhofer; Eugene Thomas, President, American Bar Association; Reverend William Yoltan, Executive Director, National Interreligious Service Board for Conscientious Objectors.

<sup>92</sup> Some have argued that the Commission itself is unconstitutional. See, e.g., Morrison, *A Fatal Flaw*, Nat'l L.J., January 26, 1987 at 15 ("Congress is not respecting separation of powers, it is shifting responsibilities that belong in one branch to another, and it is mixing the branches in carrying out the commission's very complex and very important duties"); Note, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 Yale L.J. 1363, 1388 (1987) ("The federal Sentencing Commission is constitutionally infirm. The Sentencing Reform Act vests more legislative authority than the separation of powers permits in an administrative agency composed of seven presidential appointees. The confounding of the separate functions of the different branches is aggravated by the requirement that judges be appointed to the Commission and subject to possible removal by the President.") Letter from then Chief Justice Warren Burger to President Ronald Reagan (Dec. 13, 1984) (objecting to the idea of full-time membership of three judges in active service on the Commission); Strasser, *Sentencing Panel May Start Soon*, Nat'l L.J., July 8, 1985 at 5 (Supreme Court's decision in *Bowsher* increased doubts about the Commission's constitutionality); Supreme Court Report: *Gramm-Rudman Held Invalid*, 72 A.B.A. J. 52, 61 (Oct. 1, 1986) (predicting a constitutional challenge to the Commission); Strasser, *Is Sentencing Panel on the Rocks?*, Nat'l L.J., Dec. 8, 1986, 3, 12; Werneil, *Commission on Criminal Sentencing is Tangled in Controversy About its Makeup and its Mission*, Wall Street J., Jan. 27, 1987, at 60, col. 1; Judge Edward Becker, *Testimony before the U.S. Sentencing Commission*, Public Hearing, Washington, D.C., pp. 21–22 (Dec. 3, 1986) [transcript available from United States Sentencing Commission] (listing possible constitutional challenges). But see Memorandum from the United States Department of Justice to Commission Chairman William Wilkins (Jan. 8, 1987) (concluding that, despite the Sentencing Reform Act's designation of the Commission "as an independent commission in the judicial branch of the United States" (28 U.S.C. 991(a)), the

if that means reconstituting the Commission. It should resist the temptation to tinker with the provisions of the Sentencing Reform Act, which, I still believe, are the most effective means of bringing about an enlightened reform of federal criminal sentencing.

When restarting its work, the seven most important matters for the Commission are to:

(1) **Adopt and Follow a Long-Range Program of Policy Development Before Drafting Guidelines.** The Commission could, for example, follow the outline for serious and informed policy-making described above, including the preparation of issue, background, and option papers, full debate on all relevant issues, and extensive field-testing.

(2) **Adopt and Articulate a Governing Sentencing Policy to Further the Statutory Purposes of Sentencing.** Thus, when a departure is necessary, when a vague or ambiguous term must be interpreted, or when a judge must otherwise exercise discretion in the sentencing process, all judges would be guided by the same sentencing policy.

(3) **Set Sentences to Further the Governing Sentencing Policy and Statutory Purposes Rather than to Mimic Mathematical Averages of Past Sentences.** This would bring rationality and would more effectively further the statutory goals of just punishment, deterrence, incapacitation of the dangerous, and rehabilitation.

(4) **Hire a Staff of Professionals with National Reputations, Including Guideline Experts with Experience in State Guideline Systems.** The current staff has worked extremely hard and will remain invaluable to the Commission. But because the Commission is a national Commission, it also merits professionals with national reputations in criminal law and guideline-policy development.

(5) **Add Back Into the Guidelines, as Adjustments of General Application Wherever Possible, the Commonplace Sentencing Factors Now Omitted.** At least the most commonplace sentencing factors that were recognized in earlier drafts should be added back into the guidelines. The guidelines can be considerably shortened and made less complex if the most common factors—such as causing injury, use of a weapon, and reduced culpable state of mind—are included as general adjustments applicable to any offense in which they are present. The addition of at least commonplace factors will make the

Commission is actually in the Executive Branch, and that the service of individual judges in executive agencies is constitutionally permissible.

guidelines more comprehensive, and therefore more binding. This, in turn, will reduce unwarranted disparity.

(6) Add Guidelines for All Federal Offenses; (7) Base the Guidelines on Consolidated, Non-Overlapping Offense Categories. Comprehensive and binding guidelines require that all offenses be covered. This can be done with guidelines that are shorter and less complex than the present guidelines by using consolidated, non-overlapping generic offense categories, as are found in most state codes. This will also solve the present guidelines' significant problems in sentencing for multiple offenses.

In sum, the Commission should draft principled and binding guidelines that are structured to further the Sentencing Reform Act's visionary goals of rationality and consistency in criminal sentencing. If Congress accepts anything less, we will lose an historic opportunity for visionary reform that I fear may not come again in our lifetime.

I dissent.

#### SUMMARY OF CONTENTS

**Introduction.** The Sentencing Reform Act was intended to implement Congress' inspired vision of modern criminal sentencing. Comprehensive and binding guidelines were to bring rationality and greater consistency to federal sentencing. With the guidelines promulgated today, however, that vision dims. These guidelines may well produce more irrationality and more unwarranted disparity than exists today.

##### 1. The Failure to Provide a Rational and Coherent Sentencing System.

**The Failure to Define a Rational and Coherent Policy and to Provide Sentences Calculated to Achieve the Statutory Purposes of Sentencing.** In direct violation of the Act, the guidelines do not establish sentences calculated to "assure the meeting of the purposes of sentencing [i.e., just punishment, deterrence, incapacitation of the dangerous, and rehabilitation]." They offer no sentencing philosophy; they adopt no coherent system of sentencing policies; they do not reflect serious consideration of existing research studies on how best to further the statutory purposes. Instead, the guidelines claim to simply continue past sentencing practices. In fact, the guidelines dramatically alter past practice, yet have no principled basis or explanation for the changes.

**The Impropriety of Basing Guidelines on Mathematical Averages of Past Sentences.** Sentences based on mathematical averages of past sentences are contrary to the Act and

are "bastardized" sentences that are not likely to achieve any of the statutory purposes of sentencing. Further, the guidelines incorporate inaccurate measures of past practice to determine future practice.

**The Failure to Rank Systematically Offenses According to Seriousness.** As a concomitant to its failure to adopt a principled and rational approach to drafting, the guidelines fail to reflect a systematic ranking of offenses according to their seriousness. The failure results in clearly inappropriate treatment of many offenses.

**The Failure to Provide Different Sentences for Cases that are Very Different in Seriousness: Promoting "Free" Harms and Ignoring Relevant Mitigations.** The most basic function of any sentencing system is to provide appropriately different sentences for meaningfully different cases. Taking account of relevant aggravating and mitigating factors assures that additional harms will not go unpunished—that there are no "free" harms—and that significant mitigations will be reflected in an appropriately reduced sanction. The guidelines, however, routinely allow "free" harms, and overlook relevant mitigations. They do this by ignoring highly relevant and commonplace factors (e.g., an offender's causing physical injury, use of a weapon, or reduced culpable state of mind), by taking into account only the most serious factor when multiple factors exist, and by failing to provide an incremental penalty for each of different multiple offenses.

**The Failure to Address the Problems of Fragmented and Overlapping Offenses.** The guidelines are based on specific federal code sections, rather than on consolidated, nonoverlapping generic offense categories like those used by most states. This makes it impossible to formulate an appropriate sentence where an offender's conduct violates more than one specific code provision, a common occurrence.

**2. The Failure to Reduce (and the Potential for Increasing) Unwarranted Sentencing Disparity.** The guidelines include so many invitations and directions to depart from the guidelines, in even commonplace cases, that the "guidelines" are little more than non-binding recommendations that are not likely to reduce disparity. Indeed, because the Parole Commission will no longer be adjusting the disparate sentences imposed by judges—as it does now, albeit in an inadequate way—it is very possible that unwarranted disparity will increase under these guidelines.

##### Requiring Departures, and Thus Inviting Disparity, by Adopting Skeletal Rather than Comprehensive Guidelines.

The Act permits judges to depart from the guidelines only if there exists a factor not adequately considered in drafting the guidelines. Departure was intended to be rare, however, because the guidelines were to be detailed and comprehensive. In fact, highly relevant and commonplace factors are omitted from the guidelines—even factors identified as relevant in previous drafts by the Commission. Because of these omissions, a judge must either give a sentence that is inappropriate because it does not reflect the relevant factor, or must depart from the guidelines and thereby create the disparity that the guidelines were intended to reduce.

**Fostering Departures, and Thereby Disparity, by Using Vague and Ambiguous Standards.** By using vague and ambiguous terms, frequently in key provisions, the guidelines invite disparity in application as different judges follow different interpretations.

**Fostering Disparity by Inviting (and Directing) Extensive Departures Without the Guidance of an Articulated Sentencing Policy.** The guidelines specifically invite (and in some cases direct) the court to depart from the guidelines in predictable and commonplace cases that the Commission has fully considered. Because much disparity results from differences in sentencing philosophy among judges, the guideline's failure to reflect a coherent sentencing policy, will further exacerbate the problem of unwarranted disparity under such a discretionary "departure system" of sentencing.

**3. The Failure to Prevent Plea-Bargaining from Subverting the Goals of the Guideline System.** 87% of all cases in the federal system are disposed of through a plea bargain. The guidelines permit a judge to depart from the guidelines if the sentence is pursuant to a plea bargain and the judge feels there is a "justifiable reason" to depart. This guideline provision violates the Act, which does not allow departures simply because the judge feels there is a "justifiable reason." Further, by failing to prevent plea-bargaining from subverting the system, the provision assures that the irrationality and disparity of current federal sentencing will continue under the guidelines. Such plea-bargained sentences will not achieve the statutory purposes of sentencing and are not likely to provide similar sentences for similar offenders.

**4. Impeding Future Refinement.** The rationale for skeletal, non-binding

guidelines is that such will provide a basis for refinement over time by the courts. But shifting guideline development to the courts is unwise, is inconsistent with the Act, and, in any case, would be ineffective because the guidelines are structured in a manner that will not permit the meaningful appellate review necessary for refinement.

**The Failure to Provide an Adequate Foundation for Refinement.** The lack of an articulated sentencing policy, the unwieldy and illogical structure of the guidelines, and the reliance on the antiquated, fragmented, and overlapping offense definitions of the federal code (rather than the consolidated generic offenses used in most state codes), each make the guidelines an inadequate foundation for future refinement.

**The Impropriety of Relying on the Courts to Develop the Guidelines.** It is inappropriate to rely on the judiciary to develop the guidelines. First, the guidelines fail to provide adequate direction for such development. Courts must necessarily consider issues on a case-by-case basis rather than from the system-wide perspective that is required. Courts cannot inform the policy-making process with the research studies that are needed and statutorily directed. Courts have had the opportunity to reduce or guide judicial discretion to avoid sentencing disparity in the past but have shown no willingness to do so. Finally, Congress has directed the Commission, not the courts, to structure and guide sentencing decisions.

**The Failure to Permit Adequate Appellate Review.** The guidelines assume that appellate review of departures will, over time, permit the courts to develop a "common law" of sentencing that will provide the substance and direction that they currently lack. But the failure to provide meaningful criteria for application, the failure to specify what factors have been taken into account in setting a given offense value, and the failure to articulate a rational sentencing policy, leaves sentencing judges unable to determine whether departure is appropriate and appellate judges unable to provide a principled review of a decision to depart. Further, there will be no appellate review of most departures, since departure pursuant to a plea-bargain sentence will not be subject to appellate review.

**5. The Failure to Provide an Impact Assessment.** Before promulgating guidelines that will govern the sentencing of over 100,000 federal offenders each year and that are likely to change the practice of federal

prosecutors, defense counsel, probation officers, prison officials, magistrates, and judges, it would seem appropriate (and it is feasible) to develop reliable estimates on how the guidelines will operate. Yet, the most basic effects of these guidelines have never been determined.

**6. The Fundamental Failure of the Process.** Many, if not most, of the guidelines' shortcomings have resulted from a lack of serious and informed deliberation and analysis. Because the guidelines do not embody a coherent policy-making process, the various drafts have lurched wildly from one extreme to the other, reacting to the criticisms of each previous draft. In the end, the final guidelines were drafted in three weeks and embody an approach significantly different from those previously considered—an approach that has been subject to little internal discussion or debate and no public comment or field-testing.

#### Conclusion: What Should We Do Now?

#### PRELIMINARY OBSERVATIONS OF THE COMMISSION ON COMMISSIONER ROBINSON'S DISSENT

May 1, 1987.

The Commission, having just received today a fully detailed draft of Commissioner Robinson's dissent, but aware of his general views, makes the following preliminary observations.<sup>1</sup>

1. Professor Robinson has strongly urged the Commission to adopt a highly detailed, mechanical guideline system that would aggravate punishments for each and every harm an offender causes and presumably lessen punishment for each and every relevant mitigating background factor. The Commission spent several months following the professor's lead in an effort to turn that approach into a set of workable guidelines. Professor Robinson embodied his approach in a "July 10" (1986) draft, which the Commission circulated widely within the criminal law community.

Despite the many valuable insights that his draft contained, the reaction was strongly and uniformly negative. The comments received ranged from "overly ambitious" and "ill advised" to "totally impractical" and "fraught with danger." Judge Jon O. Newman, a longtime advocate of sentencing

guidelines, wrote the Commission that the Robinson approach

will likely fail to survive a Congressional veto and, even if allowed to become effective, will lead to a generation of needless litigation, a series of invalidated sentences, opportunities for manipulation by prosecutors and defense counsel, and a source of such confusion among judges as to make likely a clamor for return to the old system.

Judge Harold Tyler, who as Deputy Attorney General (under President Ford) directed the government's efforts to create sentencing reform legislation, wrote that he "doubt[ed] the necessity or wisdom of a complicated scoring system, at least initially." He said that the July 10, 1986, draft would be "politically unacceptable to Congress"; that it would create "real resistance on the part of . . . many sentencing judges"; that it would create "substantial practical problems" for the courts; and that its many gradations were "overly refined" and "not . . . necessary." Judge Marvin Frankel, whose initial studies of sentencing disparity helped to launch the guideline movement, wrote that however splendid in their conception and execution the July 10 draft may be, it is "too far ahead of the times for the goal of acceptance by the legislative and judicial people who will be considering" it.

In brief, the Commission found no significant support for the July 10, 1986, approach. The Commission then decided not to promulgate the draft; it concluded that its descriptions bore little or no relation to the actual statutory elements of an offense and that it was excessively impractical, a kind of academic fantasy. The Commission will publish the draft, however, among its working papers; those interested in the views that Professor Robinson states in his dissent should study it with care.

2. The reason that Professor Robinson's approach drew so little support from any quarter (academics included) is that it did not provide a practical solution to the problems viewed as important by the different segments of the criminal justice community. Those particularly concerned with lessening disparity in sentencing saw in the complexity of the July 10, 1986, draft, in its need for elaborate new factfinding, and in its use of complex mathematical formulae involving multiplication of quartic roots, the likelihood that different judges would apply the system differently to similar cases, thereby aggravating the

<sup>1</sup> The six Commissioners who formed the majority concur in this observation. They are William W. Wilkins, Jr., Michael K. Block, Stephen G. Breyer, Helen G. Corrothers, George E. MacKinnon, and Ilene H. Nagel.

disparity problem. Those professionally concerned with crime control saw in its factfinding demands the need for lengthy new hearings, complex arguments and appeals, all of which would significantly lessen the likelihood that convicted criminals would, in fact, receive appropriate punishment. Those particularly sensitive to the need for special treatment of unusual cases saw in its rigid, mechanical rules and near total absence of discretion, the elimination of a court's ability to deviate when, for example, unusual facts in a specific case cried out for special treatment.

Of course, it may be that there is a practical method of responding to Professor Robinson's present criticisms by taking the approach he advocates and, within a reasonable period of time, translating it into a practical set of guidelines. But nothing in the July 10, 1986, draft, nor in his work that we have seen since that time, convinces us that this is so.

3. What Professor Robinson means by a "rational and coherent sentencing system" is a system (preferably his system) that would radically revise what he calls the "archaic, fragmented" criminal code of the United States. He urges a "visionary" approach that would base guidelines upon "modern American criminal code" descriptions of conduct, many of which descriptions are found in recently revised state codes. The problem with this view, however, is that Congress, which has considered reform of the Criminal Code for more than a decade, has not enacted that reform into law. Thus, the Commission must apply federal statutory law as it now stands, whether or not visionaries believe that the existing statutes ought to be repealed or replaced. To put the matter bluntly, the Commission does not have the political mandate or the institutional authority to rewrite the United States Criminal Code under the guise of writing sentencing guidelines. The job of revising the Criminal Code belongs to Congress, not the Commission.

4. In our view, the actual effect of any major change upon a human institution inevitably involves uncertainty and the risk of unforeseen consequences. Professor Robinson may be certain about what changes will actually come about as a result of the guidelines we propose; we are not. We, therefore, strongly believe that our proposed changes should evolve from, not represent a sharp break with, existing practice. What we do, after all, will significantly affect the entire criminal justice system of the United States. And, lacking a crystal ball capable of telling

us with precision what will actually occur, we act now perhaps less aggressively or ambitiously than Professor Robinson would like. We believe it more responsible to proceed with caution, monitoring through data gathering and analysis the actual effects of our changes at each step, then revising, modifying, and advancing our work in light of what we learn.

5. We have read Professor Robinson's dissent with an awareness that our primary task is not to produce a perfect document, but rather to create a practical document in an area where every approach suffers some drawbacks. Thus, we have primarily been interested in the alternatives that Professor Robinson has been proposing. Viewing his dissent not in this light, however, but simply as a series of criticisms, our initial reaction is that the criticisms are wide of the mark. The dissent does not accurately characterize what the guidelines are trying to do; how, for example, they make use of the empirical data,<sup>2</sup> or how and why they create some distinctions but not others.<sup>3</sup>

<sup>2</sup> The Commission, as the dissent points out, used past practice as a starting point in its guideline drafting process. But the "averages" were neither as simplistic nor their use as mathematical as the dissent strongly implies. Empirical data were used to estimate averages of time served. The "averages," however, were not based on data relevant merely to the offense. By using advanced statistical techniques, we were able to estimate the average time served for offense/offender combinations. To illustrate, the average time served was estimated for typically occurring variations of burglary offenses, including the value of the property taken, the degree of planning, the possession of a weapon, and whether the case was adjudicated through a plea of guilty or by a trial. The results of these analyses were then used as a starting point for the guidelines.

<sup>3</sup> The Commission is fully aware of the problems inherent in writing simple guidelines that might omit relevant factors—a problem that permeates the discussion in the dissent. Given the vast number of factors potentially relevant to a sentencing decision, ever greater detail is always possible. Guidelines might not only separately consider "knives," but then go on to consider whether or not a knife is a switchblade, drawn or concealed, opened or closed, large or small, used in connection with a car theft (where victim confrontation is rare), a burglary (where confrontation is unintended) or a robbery (where confrontation is intentional). There is no inherently "correct" level of detail. There are no empirical studies that tell us whether the administrative costs of making the system complex are offset by advantages of, say, increased certainty, fairness, or deterrence.

The Commission's approach to the problem of "level of detail" (as Professor Robinson is fully aware) was to use its review of 10,000 actual cases in order to identify the major factors that courts have in fact taken into account in sentencing. These 10,000 cases in the Commission's database include, for example, 1,110 instances of robbery; 40 of those 1,110 involved physical injury to a victim; 3 involved death. The Commission guideline for robbery, therefore, includes, as a specific aggravating factor, "injury to a victim". It does not include "death" because death occurs only rarely in connection with a prosecuted robbery charge. In the Commission's

The dissent's use of guideline examples is misleading or mistaken.<sup>4</sup>

The dissent, in our view, misunderstands both the statute and the guidelines.<sup>5</sup> Regardless, the issue is not whether the Commission's present draft has some anomalies or disparities; some will be found. Nor is it whether the Commission has created the theoretically or academically "best" set of guidelines. The issue is whether we wish to perpetuate the current system, a system that creates anomalies and disparities daily by allowing each of hundreds of federal judges to sentence entirely on the basis of his or her own views. It is whether, with these initial guidelines, the Commission has laid a solid groundwork for further improvement and reform. The

view, a guideline should not give specific and direct instruction in respect to a factor that occurs only 3 times in 1,110 instances. Rather that factor, when it does occur, provides grounds for departure or a separate charge. It is these factors which empirically speaking rarely occur, and which the guidelines urge as grounds for departure, that the dissent characterizes as "free harms".

<sup>4</sup> The dissent provides numerous examples of instances designed to show that the guidelines treat in a similar way different crimes that (in the dissent's view) "obviously" should be treated differently. These examples are, at best, misleading; that becomes apparent once one looks beyond the general descriptions of the crimes at issue to the specific instances to which the cited guideline provisions apply. The dissent to the contrary notwithstanding, there is nothing odd, anomalous, or "obviously wrong", for example, about treating a minor drug offense, such as the possession of three marijuana plants, the same as an environmental offense that threatens the safety of, say, wild horses. Nor is there any inherent anomaly in assigning the same offense level to a regulatory violation of an explosive statute (an offense which typically does not pose any immediate safety risk but is characterized by the dissent as "trafficking in explosives") and altering a single motor vehicle identification number.

These matters are all explained in guideline commentary, which also makes clear that even such supposedly horrific examples, as similar offense levels for "abusive sexual contact" and "unlawfully remaining or entering in the United States" are mistaken. That example loses its probative force once one reads the commentary and finds that "abusive sexual contact" refers to a specific statutory offense (involving neither force nor threat of force) that the statute classifies as a misdemeanor and for violations of which the statute imposes a maximum penalty of six months in prison.

In fact, the Commission spent considerable time and effort developing ways to treat property and other crimes consistently. An explanation of its treatment of regulatory offenses is contained in the guidelines. See Chapter One, (Introduction and Overview). Our preliminary examination of the dissent's use of examples convinces us that our methods were reasonable.

<sup>5</sup> Compare, for example, the dissent's discussion of the us 28 U.S.C. 994(m), sentence 2. To determine the accuracy of the history, one must read through the relevant statutes and reports closer to that of Judge Harold Tyler, who wrote that "the original to eradicate all disparity in federal sentencing but rather to 'sm which are gross or distorted'."

Commission is a permanent body that need not (and should not) try to complete its entire task in a single year. These initial guidelines begin a process that will create gradually but inevitably an ever fairer and more effective criminal justice system.

**SUPPLEMENTAL STATEMENT OF  
COMMISSIONERS ILENE H. NAGEL  
AND MICHAEL K. BLOCK**

May 1, 1987.

We join in the preceding Commission response to the dissent. As Chair and Co-Chair of the Commission's Research Committee, we submit this statement to elaborate on the views expressed therein.

**1. A Rational and Coherent Approach.**

The dissent attacks the Commission for not adopting a single, coherent rationale for all sentences—i.e., a complete theory of sentencing. Despite years, indeed centuries of study, however, scholars have been unable to agree upon such a single rationale. Moreover, the Sentencing Reform Act expressly rejected the notion that the Commission should follow a single rationale. Instead, the Act instructed the Commission to devise a system that would further all of the statutorily-enumerated purposes of sentencing—just punishment, deterrence, incapacitation and, to a lesser extent, rehabilitation. Such a system inevitably involves compromises and some degree of conflict.<sup>1</sup>

In view of the statute's mixed and at times conflicting directions, the Commission began where the statute instructed us to begin—with an analysis of current sentencing practices. See 28 U.S.C. 994(m). Using the results of those analyses as a guide, but without blindly following them, we developed a structure under which the resulting sentences are more rational, consistent and uniform, and, we believe, better serve the purposes of sentencing set forth in the Act.

To start, we did not, as the dissent asserts, "simply mimic the mathematical averages of past sentences." First, the

Commission did not begin with mere "averages." The Commission analyzed 10,000 detailed reports of actual cases using sophisticated, multivariate statistical techniques that enabled us to discern the significance of numerous sentencing factors in varying contexts. These analyses were supplemented through reading presentence investigation reports to determine what the cases prosecuted actually involved and to assess which factors appeared to be important. The Commission also collected and utilized, albeit to a lesser extent, less detailed data on over 40,000 actual convictions. As a result, we did not simply estimate an average sentence for robbery. Rather, we estimated how long a term of imprisonment would be served depending upon a number of factors—amount of money, weapon use, careful planning, taking of hostages, infliction of injury, degree of participation in the crime, and whether there was a trial or a guilty plea. These empirical analyses, eschewed by the dissent, ensured that the guidelines would be based upon reality and would "cover[] in one manner or another all important variations that commonly may be expected in criminal cases."<sup>2</sup> S. Rep. No. 98-225, at 168 (1983).

The results of these detailed analyses provided the starting point for the guidelines that ultimately were adopted. The Commission did not, however, blindly adopt or "simply mimic" the none-too-simple mathematical averages, although we did use them to provide guidance as to judges' perceptions of the seriousness of the various offenses, and which factors they considered important as a basis for distinguishing sentences in different cases. We reviewed the results of these analyses to determine whether the structure and degree of significance were logical and reasonable, and made changes where they were not.<sup>3</sup> We compared empirically-derived results for similar offenses and incorporated the significant factors into the guidelines for those offenses.<sup>4</sup> When compelling

arguments could be made for the inclusion of factors where little data were available, we included them, albeit cautiously.<sup>5</sup> Heeding the instructions in the legislative history,<sup>6</sup> we raised sentences for white-collar offenses, treating them essentially the same as non-white-collar offenses of equal seriousness.<sup>7</sup> Similarly, we were careful to ensure that sentences for violent crimes at least equaled current averages, and raised them when they were clearly inadequate.<sup>8</sup> And, of course, in areas such as drug offenses, where the Congress recently has given clear direction, we followed and implemented that direction, regardless of current sentencing practice.<sup>9</sup>

Even had the Commission "simply mimic[ed] the mathematical averages of past sentences," however, a substantial step toward achieving both fairer and more effective sentences would have been made. Clearly, averaging out the extremes, and irregularities of past sentences promotes more equal treatment for offenders.<sup>10</sup> Perhaps more importantly, it furthers the crime-control goal of deterrence. Rational individuals consider the likelihood as well as the severity of punishment. Merely setting the guideline sentences at the average current sentence levels would increase the certainty of imprisonment while decreasing the length of the term—more offenders would go to prison, although some would go for a shorter time. Few experts would deny that this change in the manner of distributing punishment would increase the level of deterrence, thus enhancing one of the most important purposes of the institution of punishment.<sup>11</sup>

<sup>5</sup> See § 2A4.1(b)(4) (adjustment for duration of kidnapping offense); § 2B1.1(b)(2) (adjustment for theft of firearm).

<sup>6</sup> See S. Rep. No. 98-225, at 177-78.

<sup>7</sup> Thus, embezzlement was combined with theft into § 2B1.1, and § 2F1.1 (Fraud and Deceit) is quite similar to § 2B1.1.

<sup>8</sup> Sentences for murder (§§ 2A1.1, 2A1.2), assault (§§ 2A2.1, 2A2.2), and rape (§ 2A3.1) were raised substantially.

<sup>9</sup> Professor Robinson apparently is of the view that we should ignore Congressional directives. Thus, he criticizes the Commission's decision to ignore drug purity, even though this was the approach adopted by Congress only last year. Similarly, he implies that the Commission should have set a higher sentencing range for engaging in a practice of hiring illegal aliens than for illegally entering the United States, even though Congress only last year prescribed a lower statutory maximum for the former than for the latter.

<sup>10</sup> This smoothing or leveling process necessarily results in a reduction of the amount of probation. Just as there must be fewer extremely long sentences, there must be fewer extremely short ones, i.e., less probation.

<sup>11</sup> We suspect that more uniform sentences may also further the goal of protecting the public from

<sup>2</sup> This language, which Professor Robinson quotes, implicitly recognizes that, especially initially, Congress expected uncommon cases to be dealt with through departure. This is made explicit elsewhere in the Senate report. See Part 2, *infra*.

<sup>3</sup> For example, our results showed that the average sentences for robbery of an individual were considerably lower than those for the much more common (in the federal system) offense of bank robbery, even adjusting for other relevant factors. Since we could find no rationale for this, we treated the offenses essentially the same.

<sup>4</sup> Compare § 2B3.1 (Robbery) with § 2B3.2 (Extortion) and § 2E2.1 (Extortionate Extension of Credit).

<sup>1</sup> For example, some views of just punishment (primarily Professor Robinson's) require an extremely detailed ranking of seriousness, including an incremental punishment for each harm caused by the offense. Incapacitation, on the other hand, calls for incarcerating offenders primarily on the basis of predictions of the likelihood that they will commit future crimes. To the extent that a sentencing system seeks to protect the public from future crimes by the defendant—indeed, a very real and important objective—the sentences that would result purely from harm rankings might not be appropriate. The same may be true when deterrence is the primary rationale for sentencing: some crimes that are less harmful may require greater sentences to provide adequate deterrence.

The dissent provides numerous examples of instances where the approach we have followed produced supposedly anomalous or irrational results. Because these examples were provided to us only recently<sup>12</sup> and are subject to constant change, it is pointless to attempt to address each of them directly.<sup>13</sup> Rather, we ask the reader to examine carefully each example along with the relevant guidelines and commentary, and then pose certain questions. Is the example provided one which is actually likely to occur in the federal system, or is it more appropriate for a law-school classroom?<sup>14</sup> Does the language employed in the dissent fairly represent the conduct and the provisions of the guidelines involved, or is it calculated to mislead as to the nature or scope of the supposed flaw?<sup>15</sup> Is it clear that the factor cited should result in a different guideline range?<sup>16</sup> Can the conduct

dangerous offenders, because an individual's propensity to commit crime decreases with age. Thus, incarceration tends to prevent more crimes in the earlier years than in later years.

<sup>12</sup> Had the examples been presented sooner, the Commission could have made use of them to the extent appropriate to revise guidelines that produced unintended results or to clarify language that was subject to misinterpretation.

<sup>13</sup> Indeed, as a result of their constant change, even this limited discussion of the dissent's examples may be inapt.

<sup>14</sup> For example, would someone really be charged with and convicted of obstruction of justice for merely threatening to "throw eggs" at a witness' car? How many of such cases are there?

<sup>15</sup> For example, by referring solely to the short title of "abusive sexual contact," the dissent suggests that consensual touching of a ward (statutory maximum 6 months) must receive a much higher sentence than illegal immigration (statutory maximum 6 months to 2 years). By characterizing an offense as "aggravated assault" although it involves no use of a weapon and no injury, the dissent suggests that such conduct is much more serious than smuggling \$21,000 of unquarantined and possibly infected fish of a type for which importation is prohibited.

The dissent's discussion of plea agreements appears equally disingenuous. The guidelines do not tell judges "that they need not follow the guidelines whenever the sentence is pursuant to a plea bargain." Rather, policy statements accept the inevitable fact that there is no way to prevent a judge from sentencing pursuant to a sentence agreement, but asks him to accept such an agreement only if there is a justifiable reason for departure. Currently, explicit sentencing agreements are rare. In view of the immunity of agreed-upon sentences from appeal, the Commission could not adopt any policy that was meaningfully different in effect, even if doing so were advisable at this early stage.

<sup>16</sup> Should the fact, for example, that a robbery or extortion "interfered with interstate commerce" (e.g., a shipment of tomatoes across state lines) rather than local commerce (e.g., a shipment of tomatoes elsewhere in the state) significantly affect the sentence? Is the six-month or 25% guideline range inadequate to deal with the distinction between two defendants, one of whom defrauds each of two widows of \$100,000 and the other of whom defrauds each of 40 widows of \$5,000? Which sentence should be larger, and by how much?

adequately be dealt with within the guideline range?<sup>17</sup> Should the offense of which the defendant is convicted be irrelevant?<sup>18</sup> Is the guideline sentence per se unreasonable?<sup>19</sup> Can the sentencing judge not be expected to deal with a truly anomalous result through departure?<sup>20</sup> And, finally, if the problem is real, how can the guidelines be modified to deal with it? Suggested improvements will be welcomed.

## 2. A Comprehensive Approach That Will Reduce Disparity

Although the dissent incorrectly describes the use the Commission made of past practice data, it is correct that the guidelines leave the cases that are unusual in the federal system for departure, sometimes expressly inviting the judge to depart in accordance with commentary or a separate policy statement. That is precisely what Congress expected. See S. Rep. No. 98-225, at 166 ("policy statements could also address . . . the appropriateness of sentences outside the guidelines where there exists a particular aggravating or mitigating factor which does not occur often enough to be incorporated in the sentencing guidelines themselves"). Not only is this approach sufficiently comprehensive as

<sup>17</sup> For example, is not the sentencing range in a rape with serious bodily injury—135 to 168 months—adequate to deal with the fact that the defendant also took property from (i.e., robbed) the victim during the course of the offense?

The dissent also may mislead the reader as to the effect of the guidelines for dealing with multiple offenses, asserting that "where offenses are unrelated and against different victims, only the most serious offense is punished; the others are 'free'." Yet the guideline cited provides that an additional offense does not increase the guideline offense level only in the unusual case where it is much less serious than the primary offense. In such instances, there is ordinarily a wide guideline range within which the judge is expected to consider the additional offense. The dissent's discussion of multiple property offenses ignores the fact that the property guidelines themselves contain aggravators for repeated misconduct that is part of a pattern. See, e.g., commentary to § 2B1.1.

<sup>18</sup> For example, if the defendant is convicted solely of arson, should he be punished as for an attempted civil-rights murder of which he was acquitted or which was uncharged? In many of the "free" harm examples posited by Professor Robinson, the guidelines will result in a higher sentence if the defendant is convicted of the offense that such harm represents.

<sup>19</sup> The bulk of the dissent's criticisms go not to the absolute sentences, but to the relative rankings of different factual patterns. While not unconcerned about the latter, we believe that the former are more important at this stage.

<sup>20</sup> In fact, because the guidelines have been designed to cover the vast majority of cases that do occur in practice, and incorporate those commonly-occurring factors that were determined to be important to judges, we expect the rate of departure to be low, even initially. Frequent departures will alert the Commission to modify the guidelines.

a starting point, but it readily can be expanded.<sup>21</sup>

The dissent indicts the Commission for promulgating guidelines which, it is asserted, will fail to reduce and will perhaps increase disparity. Unlike Professor Robinson, however, we have worked at modeling and testing the guidelines that were adopted. While the results are necessarily preliminary, the analyses thus far show that the guidelines will indeed make a substantial stride toward reducing the disparity inherent in current sentencing practices.

On the other hand, the Commission's experience with the system that Professor Robinson advocated showed that his system would in fact increase disparity. Disparity would be rampant under his approach because of the innumerable opportunities for variation, and insistence on including in every sentencing decision every conceivable unproved "harm" (actual, risked or threatened) as an aggravator and every imaginable failed defense as a mitigator. Each was assigned a precise numerical value. Consistent with his views, Professor Robinson presented a proposed guideline system containing an endless array of factors by which to distinguish offenses. Many of these would have required a subjective decision by the judge with an uncertain outcome.<sup>22</sup> The cumulative effect of such decisions would have been to destroy any uniformity: different judges would have treated identical cases quite differently.<sup>23</sup> The impact on the criminal

<sup>21</sup> Through its empirical work, the Commission ensured that its guidelines would be sufficiently comprehensive to satisfy the legislative mandate. All offenses that are prosecuted with any significant degree of frequency, and many that are not, are covered. We estimate that the guidelines cover about 95% of all federal convictions. The Commission chose to delay issuance of guidelines for uncommon offenses and factual patterns about which it had limited information.

<sup>22</sup> For example, the judge would have to assess whether the conduct risked any number of harms that might have been presented, and take a percentage of the corresponding "harm value" that depended on the degree of risk. The same was true for threats. Thus, for example, the precise nature of the threat to injure the victim of a robbery would govern the sentence. Not only are the results of such an approach problematic even when the nature of the threat is clear, but any number of results is possible when there is any ambiguity. Furthermore, many of the adjustments represented attempts to place precise numerical values on factors such as provocation and cooperation, which are necessarily matters of degree and therefore must involve flexibility.

<sup>23</sup> A major difficulty with Professor Robinson's approach is that simply by making subjective factual determinations that are virtually insulated from review on appeal, different judges may treat like cases differently within the guidelines. Any appearance that such guidelines would be binding

Continued

justice system would have been drastic and intolerable. See Preliminary Observations of the Commission on the Dissent, Part 1.

At the opposite extreme of a Robinson-like approach is a system of extreme simplicity. Such an approach also had its advocates, primarily those who thought the Commission could meet its responsibilities by slight modification of existing state guideline models. Like the approach advocated by Professor Robinson, those systems also produce disparity, but of a different sort. Whereas his approach gives rise to potential disparity primarily because like cases may be treated in dissimilar fashion, an approach with extremely few distinctions gives rise to potential disparity primarily because very unlike cases may be treated alike.<sup>24</sup>

After months of deliberation, the Commission opted for a more balanced intermediate approach. It is far more comprehensive and detailed than existing state systems,<sup>25</sup> but not as rigid and intrusive as the system advocated by Professor Robinson.<sup>26</sup> No guideline system can totally eliminate disparity, but the one that the Commission adopted will significantly improve upon current practice and can be improved upon as experience is gained.<sup>27</sup>

### 3. The Vision of Reform

With the guidelines promulgated by the Commission comes not the death of the vision of reform embodied in the

Sentencing Reform Act, but its first breath. While not all that potentially may be achieved through the guideline process will have been achieved by this first set of guidelines, much has been accomplished, and more will follow.

We disagree with the dissent regarding the scope of the statutory mandate and the speed with which reform was expected to progress. That Congress intended an iterative, evolutionary process is clear from the fact that one and one-half years were allotted for promulgation of the initial guidelines, but at least six subsequent years of full-time Commission effort were allotted to revise, refine and modify the guidelines.

As scientists who have studied sentencing issues empirically as well as theoretically, we agree with the dissent that empirical studies, for example, of deterrence, recidivism and incapacitation should be conducted. Consistent with the dictates of the Sentencing Reform Act, we intend to make every effort to ensure that such empirical research is conducted and that its results influence future modifications of the guidelines. We hope that in the future we will have Commissioner Robinson's support in this endeavor.<sup>28</sup>

The Commission's eighteen months of deliberation on the numerous complicated issues surrounding sentencing has indeed led us to proceed with some degree of caution. Revamping the entire system of federal criminal sentencing is an herculean task, and the changes wrought by the new system can have an enormous impact on the federal criminal justice system. In this first of many iterations, the Commission rightfully rejected the wholly revolutionary stance that Professor Robinson advocates. Absent perfect knowledge and the confidence that we possess Solomonic wisdom, we are unwilling to unleash summarily a radical overhaul of the manner in which decisions are made that will affect both the public safety of the American people

and individual liberty. If caution in such matters be our sin, then let the President and the Congress be the ones to tell us to throw caution to the wind.

### SUPPLEMENTAL STATEMENT OF COMMISSIONER GEORGE E. MACKINNON

My colleague's overly critical dissenting views are based on a plethora of highly stated principles which are allegedly ignored in the Guidelines. In the same breath that he alleges a lack of "rationality" he deprecates the Commission's reliance on "experience." Yet as Justice Holmes wrote, "the life of the law . . . has been experience."

One of my colleague's most critical comments has to do with the alleged relationship of "average sentences" to the Commission's deliberations. He ignores that our statute does "require the Commission to ascertain the average sentences imposed." 28 U.S.C. 994(m). That we did—10,000 recent sentences. And we followed the Congressional direction "not to be bound by such average sentences" . . . [but to] independently develop a sentencing range that is consistent with the "statutory purposes." Id. We complied with this direction to the best of our ability. We provided ranges, not always based on the "averages." The proof of this is implicit in the actual guideline for each offense—and in the conflicting comments we receive that the guidelines are at the same time too severe and too lenient. The Commission has in accordance with its collective judgment increased some sentences and reduced others. White collar crime and drug offenses are dealt with more severely and probation is tightened.

My colleague, while generally ignoring the completely new statutory jurisdiction of the United States Courts of Appeal to review all sentences, does refer to my comment with respect to the obligation that will be cast upon them by these Guidelines but does not consider how this will work in actual practice. No analysis of the Guidelines can ignore the fact that the statute authorizes both the defendant and the government to appeal every sentence. This is a revolutionary innovation in federal criminal jurisprudence of overwhelming magnitude.

The court of appeals on review of the sentence may, after considering the record . . . affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed or remand for further sentencing proceedings and imposition of sentence, except that a

and reduce disparity is illusory. By limiting the number of factors and concentrating on those that are most important in actual practice, the system adopted by the Commission ensures that judges will be forced to depart from the guidelines when they believe that the sentence specified by the guidelines is inappropriate. The consequence is more stringent appellate review with a likelihood of greater uniformity.

<sup>24</sup> Systems such as those now in effect in Minnesota and Washington suffer from this flaw, resulting in frequent departures.

<sup>25</sup> One of the most striking misrepresentations in the dissent is the allegation that the Commission failed to comply with the statutory directive that the guidelines be more comprehensive and detailed than the current parole guidelines. The parole guidelines are much shorter than the sentencing guidelines; even a cursory review of the parole guidelines shows that they omit hundreds of offenses and numerous factors—such as weapon possession and injury in many crimes—that are expressly incorporated into the sentencing guidelines.

<sup>26</sup> Contrary to the discussion in the dissent, the guidelines adopted by the Commission do group offenses into generic categories; they simply do not, as would Professor Robinson, totally ignore the offense of which the defendant is convicted.

<sup>27</sup> By way of contrast, because of its extremely rigid structure and its insistence that every harm or factor must count the same, either additively or multiplicatively, in every factual context, the system advocated by Professor Robinson proved virtually impossible to modify without producing unanticipated and unwanted results.

<sup>28</sup> The role of empirical research is critical to the work of the Commission. For example, empirical research has shown that the revolutionary guideline structure espoused by Professor Robinson's July 10, 1986, draft is flawed even from a just deserts perspective: the seriousness of an offense cannot be derived by adding the seriousness of its component "harms"; two or three offenses are not twice or three times as serious as a single offense; and the seriousness rankings do not necessarily correspond with imprisonment rankings. See, e.g., S. Gottfredson, K. Young & W. Laufer, *Additivity and Interactions in Seriousness Scales*, 17 J. Research in Crime & Delinquency 26 (1980); A. Blumstein & J. Cohen, *Sentencing of Convicted Offenders: An Analysis of the Public View*, 14 Law & Society Rev. 224, 236-37 (1980); H. Wagner & K. Pease, *On Adding Up Scores of Offense Seriousness*, 18 Brit. J. Criminology 175 (1978).

sentence may be made more severe only on review of the sentence taken by the United States and after hearing.  
18 U.S.C. 3576.

To furnish a basis for this review every sentencing court is required to state "in open court the reasons for its imposition of the particular sentence." (Emphasis added.) If the sentence is within the range of the Guidelines, the judge must nevertheless give his "reason for imposing a sentence at a particular point within the range . . . [and if the sentence] is outside the range [the judge is required to state] the specific reason for the imposition of a sentence different from that described." 18 U.S.C. 3553(c). Appellate jurisdiction extends to every sentence—including sentences on guilty pleas. It is thus apparent that the courts of appeal on review are going to pass on the "reasons" that the sentencing judge gives for his every sentence. These will be reasons that are individual to that particular case and if the sentence was imposed upon a plea of guilty and no trial was held the court may have to pass upon constitutional questions implicit in the court's action. The breadth of this jurisdiction and the nature of the issues that might be reviewed was not fully explained in my colleague's dissent.

I completely disagree with my colleague's comments on plea bargaining. He nowhere mentions the great prosecutorial discretion of the United States Attorney recognized by the decision in *United States v. Cox*, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965). Moreover, sentences imposed pursuant to plea bargains are subject to appeal the same as any sentence and can be set aside the same as any other sentence if the stated reasons given by the judge are inadequate.

In one respect, I am somewhat sympathetic to my colleague's dissent because I recognize there are those who

feel that sentencing, like some other things, can be reduced to a science. But in my opinion there is considerable difficulty in placing human conduct in neat pigeonholes. Courts must consider the human factors and a reasonable measure of discretion must be recognized. The statute does so. It authorizes ranges of 25% and departure for aggravating and mitigating circumstances. Courts must sentence both the criminal and the crime. Our direction from the Congress was to produce guidelines that take into account, inter alia, the relevance of the community view of the gravity of the offense, . . . the public concern generated by the offense, . . . the deterrent effect a particular sentence may have on the commission of the offense by others; and . . . the current incidence of the offense in the community and in the Nation as a whole.

28 U.S.C. 994(b).

A sentence following conviction in a criminal case should do "justice" for the victim, the public and the offender. No absolutely fixed standard can be articulated as to what constitutes justice. Justice varies with the individual, with the crime and with the societal effect of the crime. Our governing statute recognizes all these factors. Justice in each case is generally an amalgam of what sentence is necessary to deter future crimes of the same sort, what is necessary to deter the particular individual from the commission of future crimes and what would be considered by reasonable people to be a fair sentence for the transgression by the particular offender. All of these factors vary according to the severity of the crime, the nature of the crime, the frequency of the crime and the individual characteristics of the offender as demonstrated by his participation in the crime and his past

social and criminal history. No one factor will predominate in all sentences with respect to the same crime. The most important objective to be sought by a sentence will change with any given crime and with any particular individual. Any sentence can serve multiple objectives—and in most instances will. True justice is accomplished by a sentence that incorporates all sentencing objectives to the maximum extent possible. Individual judgments may vary on what constitutes a fair mix of objectives for a particular offense by a particular individual. That is the reason that 25% discretionary leeway is allowed, and that is the reason that mitigating and aggravating circumstances under the statute are authorized to justify varying sentences.

Contrary to my colleague's views I believe that the Guidelines will correct the wide unwarranted disparity that has existed in some instances in the past. The guideline sentences will assure this. Moreover, the Guidelines will assure honesty in sentencing, i.e., that the sentence imposed will be the sentence served. And that the sentences imposed will satisfy our objectives and be reasonably fair, uniform and proportional. See Guidelines, Chapter One (Introduction and Overview), p. 1.2.

In conclusion, it is my opinion that we should not support any sentencing system that fails to consider the statutory elements of the offense of which the accused was charged and convicted and I would not support any Commission action which in the nature of guidelines seeks to rewrite statutory criminal law on the ground that the particular acts of Congress were "archaic, fragmented and overlapping." Dissent at 9.E. We have no such jurisdiction.

[FR Doc. 87-10534 Filed 5-12-87; 8:45 am]

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# Test Report Federal Register

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Wednesday  
May 13, 1987

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## Part III

Department of Defense  
General Services  
Administration  
National Aeronautics and  
Space Administration

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48 CFR Parts 1, 27, and 52

Federal Acquisition Regulation Regarding  
Patents, Data, and Copyrights; Final Rule

## DEPARTMENT OF DEFENSE

GENERAL SERVICES  
ADMINISTRATIONNATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION

## 48 CFR Parts 1, 27 and 52

[Federal Acquisition Circular 84-27]

Federal Acquisition Regulation  
Regarding Patents, Data, and  
Copyrights

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule with request for comment.

**SUMMARY:** Federal Acquisition Circular (FAC) 84-27 amends the Federal Acquisition Regulation (FAR) with respect to implementation of the policy regarding legitimate proprietary interests of the United States and contractors in data required by section 301 of Pub. L. 98-577, Technical Data Management, and section 1216(a) of Pub. L. 98-525, Rights in Technical Data. Note: With the exception of 27.402, which is applicable to DoD, this final rule applies only to the civilian agencies and NASA. DoD is issuing separate coverage in the DoD Federal Acquisition Regulation supplement and has published this coverage in the *Federal Register* of April 16, 1987 (52 FR 12390).

**EFFECTIVE DATE:** June 1, 1987.

**ADDRESSES:** Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, 18th & F Streets, NW., Washington, DC 20405. Telephone (202) 523-4755.

**FOR FURTHER INFORMATION CONTACT:** Margaret A. Willis, telephone (202) 523-4755.

## SUPPLEMENTARY INFORMATION:

## A. Public Comments

On August 15, 1985, a notice of proposed rule was published in the *Federal Register* (50 FR 32870). The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council have considered the public comments solicited. Comments on this final rule will also be considered.

## B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 et seq., applies to this final rule and a Final Regulatory Flexibility Analysis has been performed. A copy of the Analysis may be obtained from the FAR Secretariat, ATTN: Margaret A. Willis, Room 4041, GS Building, 18th & F Streets, NW., Washington, DC 20405.

## C. Paperwork Reduction Act

A request for approval of the additional paperwork burden was submitted to the Office of Management and Budget and assigned OMB Clearance No. 9000-0090.

## List of Subject in 48 CFR Parts 1, 27, and 52

Government procurement.

Dated: May 7, 1987.

Harry S. Rosinski,

Acting Director, Office of Federal Acquisition and Regulatory Policy.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 84-27 is effective June 1, 1987.

Eleanor R. Spector,

Deputy Assistant Secretary of Defense for Procurement.

May 7, 1987.

Terence C. Golden,

Administrator.

S.J. Evans,

Assistant Administrator for Procurement.

Federal Acquisition Circular (FAC) 84-27 amends the Federal Acquisition Regulation (FAR) as specified below.

## Item I—Patents, Data, and Copyrights

A revision to FAR Subpart 27.4, Rights in Data and Copyrights, was issued as a proposed rule in the *Federal Register* on August 15, 1985 (50 FR 32870) for public comment. The Department of Defense (DoD), General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) hereby adopt a final rule for FAR Subpart 27.4, Rights in Data and Copyrights, after consideration of the public comments. Although this is a final rule, any additional comments on the subject will be considered.

The Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulatory Council (DARC) plan to develop a Federal Government policy beyond that stated in FAR 27.402 of the final rule. It is not possible in the near term to arrive at such a Federal policy in view of the major structural differences between the FAR and the Defense Federal Acquisition Regulation Supplement (DFARS) coverage. The CAAC and the DARC, therefore, believe it is best to continue with the separate FAR and DFARS coverage for the near term and to jointly develop a uniform Federal policy for publication in the FAR by September 30, 1988. Policies and procedures to be used after that date would be approved in advance by both councils.

Additionally, Subpart 27.4 now sets forth detailed implementation, policies,

procedures, and instructions for all civilian agencies and NASA with respect to rights in data and copyrights and acquisition of data. The DoD shall issue its detailed implementation, procedures, and instructions regarding rights in data and copyrights and acquisition of data in the DoD FAR supplement because of DoD's specialized defense acquisition and logistics support needs for national security and the requirements of 10 U.S.C. 2320 (Pub. L. 98-525, Sec. 1216(a)). Therefore, 48 CFR Parts 1, 27, and 52 are amended as set forth below.

1. The authority citation for 48 CFR Parts 1, 27, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION  
REGULATION SYSTEM

## 1.105 [Amended]

2. Section 1.105 is amended by adding, in numerical order, a FAR segment and a corresponding OMB Control Number to read as follows:

FAR segment	OMB control No.
27.4.....	9000-0090

PART 27—PATENTS, DATA, AND  
COPYRIGHTS

2. Subpart 27.4, consisting of sections 27.400 thru 27.409 is revised to read as follows:

Subpart 27.4—Rights in Data and  
Copyrights

Sec.	
27.400	Scope of subpart.
27.401	Definitions.
27.402	Policy.
27.403	Data rights—General.
27.404	Basic rights in data clause.
27.405	Other data rights provisions.
27.406	Acquisition of data.
27.407	Rights to technical data in successful proposals.
27.408	Cosponsored research and development activities.
27.409	Solicitation provisions and contract clauses.

Subpart 27.4—Rights in Data and  
Copyrights

## 27.400 Scope of subpart.

(a) The policy statement in 27.402 applies to all executive agencies. The remainder of the subpart sets forth civilian agency and National Aeronautics and Space Administration (NASA) policies, procedures, and

instructions with respect to (1) rights in data and copyrights and (2) acquisition of data. However, these policies, procedures, and instructions are not required to be applicable to NASA solicitations until December 31, 1987 (or until such other date as the NASA FAR Supplement is revised to accommodate the policies, procedures, and instructions contained in this subpart). Due to the special mission needs of the Department of Defense (DOD) and as required by 10 U.S.C. 2320, the remainder of the DOD policies, procedures, and instructions with respect to rights in data and copyrights and acquisition of data are contained in the DOD FAR Supplement (DFARS).

(b) The policies and procedures prescribed by this subpart and by DFARS, Subpart 227.4, shall be used by the respective agencies through September 30, 1988. Policies and procedures to be used after September 30, 1988, must be approved in advance by the Defense Acquisition Regulatory Council (DARC) and the Civilian Agency Acquisition Council (CAAC).

(c) Civilian agencies other than NASA shall implement section 203 of Public Law 98-577 pertaining to validation of proprietary data restrictions.

#### 27.401 Definitions.

"Computer software," as used in this subpart, means computer programs, computer data bases, and documentation thereof.

"Data," as used in this subpart, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing or management information.

"Form, fit, and function data," as used in this subpart, means data relating to items, components, processes that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements; except that for computer software it means data identifying source, functional characteristics, and performance requirements, but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.

"Limited rights," as used in this subpart, means the rights of the Government in limited rights data, as set forth in a Limited Rights Notice if included in a data rights clause of the contract.

"Limited rights data," as used in this subpart, means data, other than computer software, that embody trade secrets or are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components, or processes developed at private expense, including minor modifications thereof. (Agencies may, however, adopt the following alternate definition:

"Limited rights data," as used in this subpart, means data developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged (see 27.404(c).)

"Restricted computer software," as used in this subpart, means computer software developed at private expense and that is a trade secret; is commercial or financial and confidential or privileged; or is published copyrighted computer software; including minor modifications of such computer software.

"Restricted rights," as used in this subpart, means the rights of the Government in restricted computer software as set forth in a Restricted Rights Notice, if included in a data rights clause of the contract, or as otherwise may be included or incorporated in the contract.

"Technical data," as used in this subpart, means data other than computer software, which are of a scientific or technical nature.

"Unlimited rights," as used in this subpart, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

#### 27.402 Policy.

(a) It is necessary for the departments and agencies, in order to carry out their missions and programs, to acquire or obtain access to many kinds of data produced during or used in the performance of their contracts. Agencies require such data to: obtain competition among suppliers; fulfill certain responsibilities for disseminating and publishing the results of their activities; ensure appropriate utilization of the results of research, development, and demonstration activities including the dissemination of technical information to foster subsequent technological developments; and meet other programmatic and statutory requirements. Further, for defense purposes, such data are also required by agencies to meet specialized acquisition needs and ensure logistics support.

(b) At the same time, the Government recognizes that its contractors may have a legitimate proprietary interest (e.g., a property right or other valid economic interest) in data resulting from private investment. Protection of such data from unauthorized use and disclosure is necessary in order to prevent the compromise of such property right or economic interest, avoid jeopardizing the contractor's commercial position, and preclude impairment of the Government's ability to obtain access to or use of such data. The protection of such data by the Government is also necessary to encourage qualified contractors to participate in Government programs and apply innovative concepts to such programs. In light of the above considerations, in applying these policies, agencies shall strike a balance between the Government's need and the contractor's legitimate proprietary interest.

#### 27.403 Data rights—general.

All contracts that require data to be produced, furnished, acquired or specifically used in meeting contract performance requirements, must contain terms that delineate the respective rights and obligations of the Government and the contractor regarding the use, duplication, and disclosure of such data, except certain contracts resulting from sealed bidding or similar situations which require only existing data (other than limited rights data and restricted computer software) to be delivered and reproduction rights are not needed for such data. As a general rule the data rights clause at 52.227-14, Rights in Data—General, including *Alternates I, II, III, IV, and V*, where determined to be appropriate as discussed in 27.404, is to be used for that purpose. However, in certain contracts either the particular subject matter of the contract or the intended use of the data may require the use of other prescribed clauses, or may not require the use of any prescribed clause, as discussed in 27.405 and 27.408. Also, in selecting a data rights clause, it is important to note that any such clause does not specify the data (in terms of type, quantity or quality) that is to be delivered, but only the respective rights of the Government and the contractor to use, disclose, or reproduce such data. Accordingly, the contract should also include appropriate terms to specify the data to be delivered.

#### 27.404 Basic rights in data clause.

(a) *Unlimited rights data.* Under the clause at 52.227-14, Rights in Data—General, the Government acquires unlimited rights in the following data

(except as provided in paragraph (f) of this section for copyrighted data): (1) Data first produced in the performance of a contract (except to the extent such data constitute minor modifications to data that are limited rights data or restricted computer software); (2) form, fit, and function data delivered under contract; (3) data (except as may be included with restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under a contract; and (4) all other data delivered under the contract other than limited rights data or restricted computer software (see paragraph (b) of this section). If any of the foregoing data are published copyrighted data with the notice of 17 U.S.C. 401 or 402, the Government acquires them under a copyright license, as set forth in paragraph (f) of this section, rather than with unlimited rights.

(b) *Limited rights data and restricted computer software.* The clause at 52.227-14, Rights in Data—General, enables the contractor to protect qualifying limited rights data and restricted computer software by withholding such data from delivery to the Government and delivering form, fit, and function data in lieu thereof. However, when an agency has a need to obtain delivery of limited rights data or restricted computer software, the clause may be used with its *Alternates II or III*, as set forth in paragraphs (d) and (e) of this section. These alternatives enable a contracting officer to selectively request the delivery of such data with limited rights or restricted rights, either by specifying such delivery in the contract or by specific request.

(c) *Alternate definition of limited rights data.* In the clause at 52.227-14, Rights in Data—General, in order for data to qualify as limited rights data, in addition to being data that either embody a trade secret or are data that are commercial or financial and confidential or privileged, such data must also pertain to items, components, or processes developed at private expense, including minor modifications thereof. However, for contracts that do not require the development, use or delivery of items, components or processes that are intended to be acquired by or for the Government, an agency may adopt for general use or for use in specific circumstances the alternate definition of limited rights data set forth in *Alternate I*. The alternate definition does not require that such

data pertain to items, components, or processes developed at private expense; but rather that such data were developed at private expense and embody a trade secret or are commercial or financial and confidential or privileged.

(d) *Protection of limited rights data specified for delivery.*

(1) Contracting officers are authorized to modify the clause at 52.227-14, Rights in Data—General, by use of *Alternate II*, which *Alternate* adds subparagraph (g)(2) to the clause to enable the Government to require delivery of limited rights data rather than allowing the contractor to withhold such data. To obtain such delivery, the contract may identify and specify data to be delivered, or the contracting officer may require, by written request during contract performance, the delivery of data that has been withheld or identified as withholdable under subparagraph (g)(1) of the clause at 52.227-14 Rights in Data—General. In addition, if agreed to during negotiations, the contract may specifically identify data that are not to be delivered under *Alternate II* or which, if delivered, will be delivered with limited rights. The limited rights obtained by the Government are set forth in the Limited Rights Notice contained in subparagraph (g)(2) (*Alternate II*). Such limited rights data will not, without permission of the contractor, be used by the Government for purposes of manufacture, and will not be disclosed outside the Government except for certain specific purposes as may be set forth in the Notice, and then only if the Government makes the disclosure subject to prohibition against further use and disclosure by the recipient. The following are examples of specific purposes which may be adopted by an agency in its supplement and added to the Limited Rights Notice of subparagraph (g)(2) of the clause (*Alternate II*):

(i) Use (except for manufacture) by support service contractors.

(ii) Evaluation by nongovernment evaluators.

(iii) Use (except for manufacture) by other contractors participating in the Government's program of which the specific contract is a part, for information and use in connection with the work performed under each contract.

(iv) Emergency repair or overhaul work.

(v) Release to a foreign government, or instrumentality thereof, as the interests of the United States

Government may require, for information or evaluation, or for emergency repair or overhaul work by such government.

(2) As an aid in determining whether the clause at 52.227-14 should be used with its *Alternate II*, the provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software, may be included in any solicitation containing the clause at 52.227-14, Rights in Data—General. This representation requests that an offeror state in response to a solicitation, to the extent feasible, whether limited rights data are likely to be used in meeting the data delivery requirements set forth in the solicitation. In addition, the need for *Alternate II* should be considered during negotiations or discussion with an offeror, particularly where negotiations are based on an unsolicited proposal. However, use of the clause at 52.227-14, Rights in Data—General, without *Alternate II* does not preclude this *Alternate* from being used subsequently by modification during contract performance, should the need arise for delivery of limited rights data that have been withheld or identified as withholdable.

(3) Whenever data that would qualify as limited rights data, if it were to be delivered in human readable form, is formatted as a computer data base for the purpose of delivery under a contract containing the clause at 52.227-14, Rights in Data—General, such data is to be treated as limited rights data, rather than restricted computer software, for the purposes of paragraph (g) of that clause.

(e) *Protection of restricted computer software specified for delivery.* (1) Contracting officers are authorized to modify the clause at 52.227-14, Rights in Data—General, by use of *Alternate III*, which *Alternate* adds subparagraph (g)(3) to the clause to enable the Government to require delivery of restricted computer software rather than allowing the contractor to withhold such restricted computer software. To obtain such delivery, the contract may identify and specify the computer software to be delivered, or the contracting officer may require by written request during contract performance, the delivery of computer software that has been withheld or identified as withholdable under subparagraph (g)(1) of the clause. In addition, if agreed to during negotiations, the contract may specifically identify computer software that are not to be delivered under *Alternate III* or which, if delivered, will be with restricted rights. In considering whether to use the clause at 52.227-14

with its *Alternate III*, it should be particularly noted that unlike other data, computer software is also an end item in itself, such that if withheld and form, fit, and function data provided in lieu thereof, an operational program will not be acquired. Thus, if delivery of restricted computer software is anticipated to be needed to meet contract performance requirements, the contracting officer should assure that the clause is used with its *Alternate III*. Unless otherwise agreed to (see paragraph (e)(2) of this section) the restricted rights obtained by the Government are set forth in the Restricted Rights Notice contained in subparagraph (g)(3) (*Alternate III*). Such restricted computer software will not be used or reproduced by the Government, or disclosed outside the Government, except that the computer software may be—

(i) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(ii) Used or copied for use in or with a backup computer if any computer for which it was acquired becomes inoperative;

(iii) Reproduced for safekeeping (archives) or backup purposes;

(iv) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of any derivative software incorporating restricted computer software are made subject to the same restricted rights;

(v) Disclosed to and reproduced for use by support service contractors, subject to the same restriction under which the Government acquired the software;

(vi) Used or copied for use in or transferred to a replacement computer; and

(vii) Used in accordance with subdivisions (e)(1) (i) through (v) of this section, without disclosure prohibitions, if the computer software is published copyrighted computer software.

(2) The restricted rights set forth in subparagraph (e)(1) of this section are the minimum rights the Government normally obtains with restricted computer software and will automatically apply when such software is acquired under the Restricted Rights Notice of subparagraph (g)(3) (*Alternate III*) of the clause. However, either greater or lesser rights, consistent with the purposes and needs for which the software is to be acquired, may be specified by the contracting officer in a particular contract or prescribed in

agency regulations. For example, consideration should be given to any networking needs or any requirements for use of the computer software from remote terminals. Also, in addressing such needs, the scope of the restricted rights may be different for the documentation accompanying the computer software than for the programs and data bases. Any additions to, or limitations on, the restricted rights set forth in the Restricted Rights Notice of subparagraph (g)(3) of the clause are to be expressly stated in the contract or in a collateral agreement incorporated in and made part of the contract, and the notice modified accordingly.

(3) As an aid in determining whether the clause should be used with its *Alternate III*, the provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software, may be included in any solicitation containing the clause at 52.227-14, Rights in Data—General. This representation requests that an offeror state, in response to a solicitation, to the extent feasible, whether restricted computer software is likely to be used in meeting the data delivery requirements set forth in the solicitation. In addition, the need for *Alternate III* should be considered during negotiations or discussions with an offeror, particularly where negotiations are based on an unsolicited proposal. However, use of the clause at 52.227-14, Rights in Data—General, without *Alternate III* does not preclude this *Alternate* from being used subsequently by modification during contract performance, should the need arise for the delivery of restricted computer software that has been withheld or identified as withholdable.

(f) *Copyrighted data.*—(1) *Data first produced in the performance of a contract.* (i) In order to enhance the transfer or dissemination of information produced at Government expense, contractors are normally authorized, without prior approval of the contracting officer, to establish claim to copyright subsisting in technical or scientific articles based on or containing data first produced in the performance of work under a contract containing the clause at 52.227-14, Rights in Data—General and published in academic, technical or professional journals, symposia proceedings and similar works. Otherwise, the permission of the contracting officer is required in accordance with subdivision (f)(1)(ii) of this section or any applicable agency regulations, to establish claim to copyright subsisting in data first produced in the performance of a contract unless the clause is used with its *Alternate IV* in accordance with

subdivision (f)(1)(iii) of this section. Agencies may, however, restrict copyright under certain circumstances in accordance with subparagraph (g)(3) of this section.

(ii) Usually, permission for a contractor to establish claim to copyright subsisting in data first produced under the contract will be granted when copyright protection will enhance the appropriate transfer or dissemination of such data and the commercialization of products or processes to which it pertains. The request for permission must be made in writing, and may be made either prior to contract award or subsequently during contract performance. It should identify the data involved or furnish copies of the data for which permission is requested, as well as a statement as to the intended publication or dissemination media or other purpose for which copyright is desired. The request normally will be granted unless—(A) the data consist of a report that represents the official views of the agency or that the agency is required by statute to prepare; (B) the data are intended primarily for internal use by the Government; (C) the data are of the type that the agency itself distributes to the public under an agency program; (D) the Government determines that limitation on distribution of the data is in the national interest; (E) the Government determines that the data should be disseminated without restriction.

(iii) An *Alternate IV* is provided for use with the clause at 52.227-14, Rights in Data—General, which *Alternate* provides a substitute subparagraph (c)(1) in the clause granting blanket permission for contractors to establish claim to copyright subsisting in all data first produced in the performance of the contract without further request being made by the contractor. *Alternate IV* shall be used in all contracts for basic or applied research (other than those for management or operation of Government facilities and in contracts and subcontracts in support of programs being conducted at such facilities or where international agreements require otherwise) to be performed solely by colleges and universities. *Alternate IV* will not be used in contracts with colleges and universities if a purpose of the contract is for development of computer software for distribution to the public (including use in solicitations) by or on behalf of the Government. In addition, *Alternate IV* may be used in other contracts if an agency determines to grant blanket permission for contractors to establish claim to

copyright subsisting in all data first produced in the performance of contract without further request being made by the contractor. In any contract where *Alternate IV* is used, the contract may exclude any data, items or categories of data from the blanket permission granted, either by express provisions in the contract or by the addition of a subparagraph (d)(3) to the clause, consistent with subparagraph (g)(3) of this section.

(iv) Whenever a contractor establishes claim to copyright subsisting in data (other than computer software) first produced in the performance of a contract, the Government is granted a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, perform publicly and display publicly by or on behalf of the Government, for all such data, as set forth in subparagraph (c)(1) of the clause at 52.227-14, Rights in Data—General. For computer software the scope of the Government's license does not include the right to distribute to the public. Agencies may also, either on a case-by-case basis, or on a class basis if provided in implementing regulations, obtain a license of different scope than set forth in subparagraph (c)(1) of the clause if the agency determines that such different license will substantially enhance the transfer or dissemination of any data first produced under the contract, and will not interfere with the Government's use of the data as contemplated by the contract or if required for international agreements. If an agency obtains such a different license, the scope of that license shall be clearly stated in a conspicuous place on the medium on which the data is recorded. That is, if a report, the scope of the different license shall be put on the cover, or first page, of the report. If computer software, the scope of the different license shall be placed on the most conspicuous place available.

(v) Whenever a contractor establishes claim to copyright in data first produced in the performance of a contract, irrespective of which *Alternate* is used with the clause or the scope of the Government's license, the contractor is required to affix the applicable copyright notices of 17 U.S.C. 401 or 402, and acknowledgment of Government sponsorship (including the contract number) to the data whenever such data are delivered to the Government, published, or deposited for registration as a published work in the U.S. Copyright Office. Failure to do so could result in such data being treated as

unlimited rights data (see paragraph (i) of this section).

(2) *Data not first produced in the performance of a contract.* (i) Contractors are not to incorporate in data delivered under a contract any data that is not first produced under the contract and that is marked with the copyright notice of 17 U.S.C. 401 or 402, without either (A) acquiring for or granting to the Government certain copyright license rights for the data, or (B) obtaining permission from the contracting officer to do otherwise. The copyright license the Government acquires for such data will normally be of the same scope as discussed in subdivision (f)(1)(iv) of this section, and is set forth in subparagraph (c)(2) of the clause at 52.227-14, Rights in Data—General. However, agencies may, on a case-by-case basis, or on a class basis if provided in implementing agency regulations, obtain a license of different scope if the agency determines that such different license will not be inconsistent with the purpose of acquiring the data. If a license of a different scope is acquired, it must be so stated in the contract and clearly set forth in a conspicuous place on the data when delivered to the Government. In addition, if computer software not first produced under a contract is delivered with the copyright notice of 17 U.S.C. 401, the Government's license will be as set forth in subparagraph (g)(3) (*Alternate III*) if included in the clause at 52.227-14, Rights in Data—General, or as otherwise may be provided in a collateral agreement incorporated in or made part of the contract.

(ii) Contractors delivering data with both an authorized limited rights or restricted rights notice and the copyright notice of 17 U.S.C. 401 or 402 should modify the copyright notice to include the following (or similar) statement: "Unpublished—all rights reserved under the copyright laws of the United States." If this statement is omitted, the contractor may be afforded an opportunity to correct it in accordance with paragraph (h) of this section. Otherwise, data delivered with a copyright notice of 17 U.S.C. 401 or 402 may be presumed to be published copyrightable data subject to the applicable license rights set forth in subdivision (f)(2)(i) of this section, without disclosure limitations or restrictions.

(iii) If contractor action causes limited rights or restricted rights data to be published with the copyright notice of 17 U.S.C. 401 or 402 after its delivery to the Government, the Government is relieved of disclosure and use limitations and

restrictions regarding such data, and the contractor should advise the Government, request that a copyright notice be placed on the copies of the data delivered to the Government and acknowledge that the applicable copyright license set forth in subdivision (f)(2)(i) of this section applies.

(g) *Release, publication, and use of data.* (1) In paragraph (d) of the clause at 52.227-14, Rights in Data—General, subparagraph (d)(1) recognizes the fact that normally the contractor has the right to use, release to others, reproduce, distribute, or publish data first produced in the performance of a contract, except to the extent such data may be subject to Federal export control or to national security laws or regulations. In addition, to the extent the contractor receives or is given access to data that is necessary for the performance of the contract from or by the Government or others acting on behalf of the Government, and the data contains restrictive markings, subparagraph (d)(2) provides an agreement with the contractor to treat the data in accordance with the markings, unless otherwise specifically authorized by the contracting officer.

(2) In contracts for basic or applied research with universities or colleges, no restrictions may be placed upon the conduct of or reporting on the results of unclassified basic or applied research, except as provided in applicable U.S. Statutes. For the purposes of this subparagraph, agency restrictions on the release or disclosure of computer software that has been, readily can be, or is intended to be, developed to the point of practical application (including for agency distribution under established programs) are not considered restrictions on the reporting of the results of basic or applied research. Agencies may also restrict claim to copyright in any computer software for purposes of established agency distribution programs, or where required to accomplish the purpose for which the software is produced.

(3) Except for the results of basic or applied research under contracts with universities or colleges, agencies may, to the extent provided in their FAR supplements, place limitations or restrictions on the contractor's right to use, release to others, reproduce, distribute, or publish any data first produced in the performance of the contract, including a requirement to assign copyright to the Government or another party, either by adding a subparagraph (d)(3) to the Rights in Data—General clause at 52.227-14, or by express limitations or restrictions in the contract. In the latter case, the

limitations or restrictions should be referenced in the Rights in Data—General clause. However, such regulatory restrictions or limitations are not to be imposed unless they are determined by the agency to be necessary in the furtherance of agency mission objectives, needed to support specific agency programs, or necessary to meet statutory requirements. Notwithstanding the provisions of this subparagraph, agencies may obtain, if provided in their FAR supplement, for information purposes only, advance copies of articles intended for publication in academic, scientific or technical journals or symposia proceedings or similar works.

(h) *Unauthorized marking of data.* Except for validation of restrictive markings on technical data under contracts for major systems, or for support of major systems, by agencies subject to the provisions of Title III of the Federal Property and Administrative Services Act of 1949, the Government has, in accordance with paragraph (e) of the clause at 52.227-14, Rights in Data—General, the right to either return to the contractor data containing markings not authorized by that clause, or to cancel or ignore such markings. However, markings will not be canceled or ignored without making written inquiry of the contractor and affording the contractor at least 30 days to provide a written justification to substantiate the propriety of the markings. Failure of the contractor to respond, or failure to provide a written justification to substantiate the propriety of the markings within the time afforded, may result in the Government's action to cancel or ignore the markings. If the contractor provides a written justification to substantiate the propriety of the markings, it will be considered by the contracting officer and the contractor notified of any determination based thereon. If the contracting officer determines that the markings are authorized, the contractor will be so notified in writing. Further, if the contracting officer determines, with concurrence of the head of the contracting activity, that the markings are not authorized, the contractor will be furnished a written determination which shall become the final agency decision regarding the appropriateness of the markings and the markings will no longer be made subject to disclosure prohibitions, unless the contractor files suit within 90 days in a court of competent jurisdiction. In any event, the markings will not be cancelled or ignored unless the contractor fails to

respond within the period provided, or, if the contractor does respond, until final resolution of the matter, either by the contracting officer's determination becoming the final agency decision or by final disposition of the matter by court decision if suit is filed. The foregoing procedures may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request thereunder. In addition, the contractor is not precluded from bringing a claim under the Contract Disputes Act, including pursuant to the Disputes clause of this contract if applicable, that may arise as the result of the Government's action to remove or ignore any markings on data, unless such action occurs as the result of a final disposition of the matter by a court of competent jurisdiction.

(i) *Omitted or incorrect notices.* (1) Data delivered under a contract containing the clause at 52.227-14, Rights in Data—General, without a limited rights notice or restricted rights notice, and without a copyright notice, will be presumed to have been delivered with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the contractor may within 6 months (or a longer period approved by the contracting officer for good cause shown) request permission of the contracting officer to have omitted limited rights or restricted rights notices, as applicable, placed on qualifying data at the contractor's expense, and the contracting officer may agree to so permit if the contractor (i) identifies the data for which a notice is to be added or corrected, (ii) demonstrates that the omission of the proposed notice was inadvertent, (iii) establishes that use of the proposed notice is authorized, and (iv) acknowledges that the Government has no liability with respect to any disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The contracting officer may also (i) permit correction, at the contractor's expense, of incorrect notices if the contractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized, or (ii) correct any incorrect notices.

(j) *Inspection of data at the contractor's facility.* Contracting officers may obtain the right to inspect data at the contractor's facility by use of

*Alternate V*, which adds paragraph (j) to provide that right in the clause at 52.227-14, Rights in Data—General. Agencies may also adopt *Alternate V* for general use. The data subject to inspection may be data withheld or withholdable under subparagraph (g)(1) of the clause. Such inspection may be made by the contracting officer or designee (including nongovernmental personnel under the same conditions as the contracting officer) for the purpose of verifying a contractor's assertion regarding the limited rights or restricted rights status of the data, or for evaluating work performance under the contract. This right may be exercised up to 3 years after acceptance of all items to be delivered under the contract. The contract may specify data items that are not subject to inspection under paragraph (j) (*Alternate V*). If the contractor demonstrates to the contracting officer that there would be a possible conflict of interest if inspection were made by a particular representative, the contracting officer shall designate an alternate representative.

#### 27.405 Other data rights provisions.

(a) *Production of special works.* (1) The clause at 52.227-17, Rights in Data—Special Works, is to be used in contracts (or may be made applicable to portions thereof) that are primarily for the production or compilation of data (other than limited rights data or restricted computer software) for the Government's own use, or when there is a specific need to limit distribution and use of the data and/or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples are contracts for—

(i) The production of audiovisual works, including motion pictures or television recordings with or without accompanying sound, or for the preparation of motion picture scripts, musical compositions, sound tracks, translation, adaptation, and the like;

(ii) Histories of the respective agencies, departments, services, or units thereof;

(iii) Surveys of Government establishments;

(iv) Works pertaining to the instruction or guidance of Government officers and employees in the discharge of their official duties;

(v) The compilation of reports, books, studies, surveys, or similar documents that do not involve research, development, or experimental work;

(vi) The collection of data containing personally identifiable information such

that the disclosure thereof would violate the right of privacy or publicity of the individual to whom the information relates;

(vii) Investigatory reports; or

(viii) The development, accumulation, or compilation of data (other than that resulting from research, development, or experimental work performed by the contractor), the early release of which could prejudice follow-on acquisition activities or agency regulatory or enforcement activities.

(2) The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released, or reproduced other than for contract performance. Contracts for the production of audiovisual works, sound recordings, etc., may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the works are acquired.

(3) Subdivision (c)(1)(ii) of the clause at 52.227-17, Rights in Data—Special Works, which enables the Government to obtain assignment of copyright in any data first produced in the performance of the contract, may be deleted if the contracting officer determines that such assignment is not needed to further the objectives of the contract.

(4) Paragraph (e) of the clause, which requires the contractor to indemnify the Government against any liability incurred as the result of any violation of trade secrets, copyrights, right of privacy or publicity, or any libelous or other unlawful matter arising out of or contained in any production or compilation of data that are subject to the clause, may be deleted or limited in scope where the contracting officer determines that, because of the nature of the particular data involved, such liability will not arise.

(5) When the audiovisual or other special works are produced to accomplish a public purpose other than acquisition for the Government's own use (such as for production and distribution to the public of such works by other than a Federal agency) agencies are authorized to modify the Rights in Data—Special Works clause for use in such contracts, with rights in data provisions which meet agency mission needs yet protect free speech and freedom of expression, as well as the artistic license of the creator of the work.

(b) *Rights relating to existing data other than limited rights data—(1) Acquisition of existing audiovisual and similar works.* The clause at 52.227-18, Rights in Data—Existing Works, is for use in contracts exclusively for the

acquisition (without modification) of existing motion pictures, television recordings, and other audiovisual works; sound recordings; musical, dramatic, and literary works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; and works of a similar nature. The contract may set forth limitations consistent with the purposes for which the works covered by the contract are being acquired. Examples of these limitations are (i) means of exhibition or transmission, (ii) time, (iii) type of audience, and (iv) geographical location. If the contract requires that works of the type indicated in subparagraph (b)(1) of this section are to be modified through editing, translation, or addition of subject matter, etc. (rather than purchased in existing form) the clause at 52.227-17, Rights in Data—Special Works, is to be used. (See paragraph (a) of this section.)

(2) *Acquisition of existing computer software.* (i) When contracting other than from GSA's Multiple Award Schedule contracts for the acquisition of existing computer software (i.e., privately developed software normally vended commercially under a license or lease agreement restricting its use, disclosure, or reproduction), no specific contract clause prescribed in this subpart need be used, but the contract (or purchase order) must specifically address the Government's rights to use, disclose and reproduce the software, which rights must be sufficient for the Government to fulfill the need for which the software is being acquired. Such rights may be negotiated and set forth in the contract using the guidance concerning restricted rights as set forth in 27.404(e), or the clause at 52.227-19, Commercial Computer Software—Restricted Rights, may be used. Restricted computer software acquired under GSA Multiple Award Schedule contracts and orders are excluded from this requirement. The guidance concerning rights set forth in 27.404(e), as well as those in the clause at 52.227-19, are the minimum rights the Government usually should accept. Thus if greater rights than these minimum rights are needed, or lesser rights are to be acquired, they must be negotiated and set forth in the contract (or purchase order). This includes any additions to, or limitations on, the rights set forth in paragraph (b) of the clause at 52.227-19 when used. Examples of greater rights may be those necessary for networking purposes or use of the software from remote terminals communicating with a host computer where the software is located. If the computer software is to be acquired with unlimited rights, the contract must

also so state. In addition, the contract must adequately describe the computer programs and/or data bases, the form (tapes, punch cards, disk pack, and the like), and all the necessary documentation pertaining thereto. If the acquisition is by lease or license, the disposition of the computer software (by returning to the vendor or destroying) at the end of the term of the lease or license must be addressed.

(ii) If the contract incorporates, makes reference to, or uses a vendor's standard commercial lease, license, or purchase agreement, such agreement shall be reviewed to assure that it is consistent with subdivision (b)(2)(i) of this section. Caution should be exercised in accepting a vendor's terms and conditions, since they may be directed to commercial sales and may not be appropriate for Government contracts. Any inconsistencies in a vendor's standard commercial agreement shall be addressed in the contract and the contract terms shall take precedence over the vendor's standard commercial agreement. If the clause at 52.227-19, Commercial Computer Software—Restricted Rights, is used, inconsistencies in the vendor's standard commercial agreement regarding the Government's right to use, duplicate or disclose the computer software are reconciled by that clause.

(iii) If a prime contractor under a contract containing the clause at 52.227-14, Rights in Data—General, with subparagraph (g)(3) (*Alternate III*) in the clause, acquires restricted computer software from a subcontractor (at any tier) as a separate acquisition for delivery to or for use on behalf of the Government, the contracting officer may approve any additions to, or limitations on the restricted rights in the Restricted Rights Notice of subparagraph (g)(3) in a collateral agreement incorporated in and made part of the contract.

(3) *Other existing data and works.* Except for existing audiovisual and similar works pursuant to subparagraph (b)(1) of this section, and existing computer software pursuant to subparagraph (b)(2) of this section, no clause contained in this subpart is required to be included in (i) contracts solely for the acquisition of books, periodicals, and other printed items in the exact form in which such items are to be obtained unless reproduction rights are to be acquired; or (ii) other contracts (e.g., contracts resulting from sealed bidding) that require only existing data (other than limited rights data) to be delivered and such data are available without disclosure prohibitions, unless reproduction rights

to the data are to be obtained. If the reproduction rights to the data are to be obtained in any contract of the type described in subdivision (b)(3) (i) or (ii) of this section, such rights must be specifically set forth in the contract. No clause contained in this subpart is required to be included in contracts substantially for on-line data base services in the same form as they are normally available to the general public.

(c) *Contracts awarded under Small Business Innovative Research (SBIR) Program.* The clause at 52.227-20, Rights in Data—SBIR Program, is for use in all Phase I and Phase II contracts awarded under the Small Business Innovative Research Program (SBIR) established pursuant to Pub. L. 97-219 (the Small Business Innovation Development Act of 1982). The clause is limited to use solely in contracts awarded under the SBIR Program, and is the only data rights clause to be used in such contracts.

#### 27.406 Acquisition of data.

(a) *General.* (1) It is the Government's practice to determine, to the extent feasible, its data requirements in time for inclusion in solicitations. The data requirements may be subject to revision during contract negotiations. Since the preparation, reformatting, maintenance and updating, cataloging, and storage of data represents an expense to both the Government and the contractor, efforts should be made to keep the contract data requirements to a minimum, consistent with the purposes of the contract.

(2) To the extent feasible, all known data requirements, including the time and place for delivery and any limitations and restrictions to be imposed on the contractor in the handling of the data, shall be specified in the contract. Further, and to the extent feasible, in major system acquisitions, data requirements shall be set out as separate contract line items. In establishing the contract data requirements and in specifying data items to be delivered by a contractor, agencies may, consistent with subparagraph (a)(1) of this section, develop their own contract schedule provisions in agency procedures (including data requirements lists) for listing, specifying, identifying source, assuring delivery, and handling any data required to be delivered, first produced, or specifically used in the performance of the contract.

(3) Data delivery requirements should normally not require that a contractor provide the Government, as a condition of the procurement, unlimited rights in data that qualify as limited rights data or restricted computer software. Rather,

form, fit, and function data may be furnished with unlimited rights in lieu of the qualifying data, or the qualifying data may be furnished with limited rights or restricted rights if needed (see 27.404 (d) and (e)). If greater rights are needed such need should be clearly set forth in the solicitation and the contractor fairly compensated for such greater rights.

(b) *Additional data requirements.* (1) Recognizing that in some contracting situations, such as experimental, developmental, research, or demonstration contracts, it may not be feasible to ascertain all the data requirements at the time of contracting, the clause at 52.227-16, Additional Data Requirements, may be used to enable the subsequent ordering by the contracting officer of additional data first produced or specifically used in the performance of such contracts as the actual requirements become known. The clause shall normally be used in solicitations and contracts involving experimental, developmental, research or demonstration work (other than basic or applied research to be performed under a contract solely by a university or college when the contract amount will be \$500,000 or less) unless all the requirements for data are believed to be known at the time of contracting and specified in the contract. If the contract is for basic or applied research to be performed by a university or college, and the contracting officer believes the contract effort will in the future exceed \$500,000, even though the initial award does not, the contracting officer may include the clause in the initial award.

(2) Data may be ordered under the clause at 52.227-16, Additional Data Requirements, at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under the contract. The contractor is to be compensated for converting the data into the prescribed form, for reproduction, and for delivery. In order to minimize storage costs for the retention of data, the contractor may be relieved of retention requirements for specified data items by the contracting officer at any time during the retention period required by the clause. The contracting officer may permit the contractor to identify and specify in the contract data not to be ordered for delivery under the Additional Data Requirements clause if such data is not necessary to meet the Government's requirements for data. Also, the contracting officer may alter the Additional Data Requirements clause by deleting the term "or specifically used" in paragraph (a) thereof if delivery of such data is not necessary to meet the

Government's requirements for data. Any data ordered under this clause will be subject to the Rights in Data—General clause (or other equivalent clause setting forth the respective rights of the Government and the contractor) in the contract, and data authorized to be withheld under such clause will not be required to be delivered under the Additional Data Requirements clause, except as provided in *Alternate II* or *Alternate III*, if included in the clause (see 27.404 (d) and (e)).

(3) Agencies not having an established program for dissemination of computer software shall give consideration to not ordering additional computer software under the clause at 52.227-16, Additional Data Requirements, for the sole purpose of disseminating or marketing of the software to the public especially if this will provide the contractor additional incentive to make improvements to the software at its own expense and disseminate or market it. This should not preclude an agency from including a summary description of computer software available from a contractor in any data dissemination programs which it operates, with a statement as to how the potential user can obtain it through the contractor, licensee, or assignee. In cases where the contracting officer orders software for internal purposes, consideration shall be given, consistent with the Government's needs, to not ordering particular source codes, algorithms, processes, formulae or flow charts of the software if the contractor shows that this aids its efforts to disseminate or market the software.

(c) *Acceptance of data.* Acceptability of technical data delivered under a contract shall be in accordance with the appropriate contract clause as required by Subpart 46.3, and the clause at 52.227-21, Technical Data Certification, Revision, and Withholding of Payment—Major Systems, when it is included in the contract. (See paragraph (d) of this section.)

(d) *Major system acquisition.* (1) In order to assure that technical data needed to support a major system acquisition are timely delivered and are complete, accurate, and satisfy the requirements of the contract concerning the data, the clause at 52.227-21, Technical Data Certification, Revision, and Withholding of Payment—Major Systems, is to be included in contracts for or in support of a major system (as the term "major system" is defined in section 4 of the Office of Federal Procurement Policy Act, as amended by Pub. L. 98-577), including every detailed design, development, or production contract for a major system acquisition

and contracts for any individual part, component, subassembly, assembly, or subsystem integral to the major system, and other property which may be replaced during the service life of the system, and including spare parts and replenishment spare parts.

(2) The clause at 52.227-21, Technical Data, Certification, Revision, and Withholding of Payment—Major Systems, requires the contractor, upon delivery of any technical data made subject to the clause in the contract, to certify that to the best of its knowledge and belief, such data are complete, accurate, and comply with contract requirements. It also provides for corrections of any deficiencies in the data, as well as for the ability of the contracting officer to request revisions of the data to reflect engineering design changes made during performance of the contract and affecting form, fit, and function of the items the data depict. Further included is the authority for the contracting officer to withhold payment under the contract to assure timely delivery of the technical data and/or assure correction if the technical data are not complete, accurate, and in compliance with contract requirements.

(3) When the clause at 52.227-21, Technical Data, Certification, Revision and Withholding of Payment—Major Systems, is used, the section of the contract specifying data delivery requirements (see subparagraph (a)(2) of this section) shall expressly identify those line items of technical data to which the clause applies. Upon delivery of such technical data, the contracting officer or designee shall review the technical data and the contractor's certification relating thereto to assure that the data are complete, accurate, and comply with contract requirements. If not, the contractor is to be requested to correct the deficiencies, and payment may be withheld until such is done. Final payment should not be made under the contract until it has been determined that the delivery requirements of those line items of data to which the clause applies have been satisfactorily met.

(4) In a contract for or in support of a major system awarded by a civilian agency other than NASA or the U.S. Coast Guard the contracting officer shall include contractual provisions requiring, as an element of performance under the contract, the delivery of any technical data, other than computer software, relating to the major system or supplies for the major system procured or to be procured by the Government, which are to be developed exclusively with Federal funds in the performance of the

contract if the delivery of such technical data is needed to ensure the competitive acquisition of supplies or services that will be required in substantial quantities in the future. The clause at 52.227-22, Major System—Minimum Rights, is to be included in such contracts in addition to the clause at 52.227-14, Rights in Data—General, and other required clauses, to ensure that the Government acquires at least those rights required by Pub. L. 98-577 in technical data developed exclusively with Federal funds. In any contract to which this subparagraph (d)(4) applies, technical data, other than computer software, relating to a major system or supplies for a major system, procured or to be procured by the Government and also relating to the design, development, or manufacture of products or processes offered or to be offered for sale to the public (except for such data as may be necessary for the Government to operate or maintain the product, or use the process if obtained by the United States as an element of performance under the contract), shall not be required to be provided to the Government from persons who have developed such products or processes as a condition for the procurement of such products or processes by the Government.

#### **27.407 Rights to technical data in successful proposals.**

(a) Contracting officers may, in consideration of contract award, desire to acquire unlimited rights in technical data (but not commercial or financial information) contained in a successful proposal upon which a contract award is based. However, before such unlimited rights are acquired, the prospective contractor must be afforded the opportunity either (1) to advise the contracting officer that the technical data, or portions thereof (to be identified by the prospective contractor), are covered by any restrictive notice regarding the disclosure and use of proposal information authorized by Subpart 15.4 or 15.5 (or any agency supplement thereto), and request that such protection be maintained by excluding the data from the Government's rights; or (2) to establish to the contracting officer's satisfaction that identified portions of the technical data do not relate directly to or will not be utilized in the work to be performed under the contract, and request that such portions be excluded from the Government's rights.

(b) If unlimited rights to technical data in successful proposals, as set forth in paragraph (a) of this section, are to be acquired, it shall be by use of the clause

at 52.227-23, Rights to Proposal Data (Technical). Any excluded technical data will be identified by inserting appropriate proposal page numbers in the clause, which clause enables the identification of data to be excluded from the Government's rights, as discussed in paragraph (a) of this section. Such exclusion is not dispositive of the protective status of the data, but any excluded technical data, as well as any commercial and financial information contained in the proposal, will remain subject to the policies in Subpart 15.4 or 15.5 (or agency supplements thereto) relating to proposal information (i.e., will be used for evaluation purposes only). If the clause at 52.227-23, Rights to Proposal Data (Technical), is included in a contract, the prospective contractor must be specifically afforded the opportunity to exclude technical data as set forth in paragraph (a) of this section, and the contract file must reflect that fact. If there is a need to have access to any of the excluded technical data during contract performance, consideration should be given to their acquisition as limited rights data, if they so qualify, in accordance with 27.404(d).

#### **27.408 Cosponsored research and development activities.**

(a) In contracts involving cosponsored research and development wherein the contractor is required to make substantial contributions of funds or resources (i.e., by cost-sharing or by repayment of nonrecurring costs), and the contractor's and the Government's respective contributions to any item, component, process, or computer software, developed or produced under the contract are not readily segregable, the contracting officer may limit the acquisition of or acquire less than unlimited rights to any data developed and delivered under such contract. Agencies may regulate the use of this authority in their supplements. Basically such rights should, at a minimum, assure use of the data for agreed-to Governmental purposes (including procurement rights as appropriate), and will address any disclosure limitations or restrictions to be imposed on the data. Also, consideration may be given to directed licensing provisions if needed to carry out the objectives of the contract. Since the purpose of the cosponsored research and development, the legitimate proprietary interests of the contractor, the needs of the Government, and the respective contributions of both parties may vary, no specific clauses are prescribed, but a clause providing less than unlimited

rights in the Government for data developed and delivered under the contract (such as license rights) may be tailored to the circumstances consistent with the foregoing and the policy set forth in 27.402. As a guide, such clause may be appropriate when the contractor contributes money or resources, or agrees to make repayment of nonrecurring costs, of a value of approximately 50 percent of the total cost of the contract (i.e., Government, contractor, and/or third party paid costs), and the respective contributions are not readily segregable for any work element to be performed under the contract. Such clause may be used for all or for only specifically identified tasks or work elements under the contract. In the latter instance, its use will be in addition to whatever other data rights clause is prescribed under this subpart, with the contract specifically identifying which clause is to apply to which tasks or work elements. Further, such clause may not be appropriate where the purpose of the contract is to produce data for dissemination to the public, or to develop or demonstrate technologies which will be available, in any event, to the public for their direct use.

(b) Where the contractor's contributions are readily segregable (by performance requirements and the funding therefor) and so identified in the contract, any data resulting therefrom may be treated under such clause as limited rights data or restricted computer software in accordance with 27.404 (d) or (e), as applicable; or if such treatment is inconsistent with the purpose of the contract, rights to such data may, if so negotiated and stated in the contract, be treated in a manner consistent with paragraph (a) of this section.

#### 27.409 Solicitation provisions and contract clauses.

(a)(1) The contracting officer shall insert the clause at 52.227-14, Rights in Data—General, including its use with *Alternate I* through *Alternate V* as may be required or authorized in accordance with paragraphs (b) through (f) of this section, in solicitations and contracts if it is contemplated that data will be produced, furnished, or acquired under the contract, unless the contract is—

(i) For the production of special works of the type set forth in 27.405(a), but the clause at 52.227-14, Rights in Data—General, shall be included in the contract and made applicable to data other than special works, as appropriate;

(ii) For the acquisition of existing data works, as described in 27.405(b);

(iii) To be performed outside the United States, its possessions, and Puerto Rico, in which case agencies may prescribe different clauses (see paragraph (n) of this section);

(iv) For architect-engineer services or construction work, in which case agencies may utilize the clause at 52.227-17, Rights in Data—Special Works, or may prescribe different clauses;

(v) A Small Business Innovation Research contract (see paragraph (l) of this section);

(vi) For the management, operation, design, or construction of a Government-owned facility to perform research, development, or production work, in which case agencies may prescribe different clauses (see paragraph (p) of this section) or

(vii) A contract involving cosponsored research and development in which a clause providing for less than unlimited right has been authorized. (See 27.408).

(2) Subparagraph (e)(3) of the clause at 52.227-14, Rights in Data—General, may be deleted or reserved by an agency not subject to Title III of the Federal Property and Administrative Services Act.

(b) If an agency determines, in accordance with 27.404(c), to adopt the alternate definition of "Limited Rights Data" in paragraph (a) of the clause, the clause shall be used with its *Alternate I*.

(c) In accordance with 27.404(d), if a contracting officer determines it is necessary to obtain the delivery of limited rights data, the clause shall be used with its *Alternate II*. The contracting officer shall, when *Alternate II* is used, assure that the purposes, if any, for which limited rights data are to be disclosed outside the Government are included in the "Limited Rights Notice" of subparagraph (g)(2) of the clause.

(d) In accordance with 27.404(e), if a contracting officer determines it is necessary to obtain the delivery of restricted computer software, the clause shall be used with its *Alternate III*. Any greater or lesser rights regarding the use, duplication, or disclosure of restricted computer software than those set forth in the Restricted Rights Notice of subparagraph (g)(3) of the clause must be specified in the contract and the notice modified accordingly.

(e) The clause shall be used with its *Alternate IV* in contracts for basic or applied research (other than those for the management or operation of Government facilities or where international agreements require otherwise), to be performed solely by universities and colleges. The clause may be used with its *Alternate IV* in

other contracts if in accordance with 27.404(f)(2) an agency determines to grant blanket permission for the contractor to establish claim to copyright subsisting in all data first produced without further request being made by the contractor. When *Alternate IV* is used, the contract may exclude items or categories of data from the blanket permission granted, either by express provisions in the contract or by the addition of a subparagraph (d)(3) to the clause (see 27.404(g)(2)).

(f) In accordance with 27.404(i), if a contracting officer needs to have the right to inspect certain data at a contractor's facility or if by an agency, generally the clause shall be used with its *Alternate V*.

(g) In accordance with 27.404(d)(2), if the contracting officer desires to have an offeror state in response to a solicitation, to the extent feasible, whether limited rights data or restricted computer software are likely to be used in meeting the data delivery requirements set forth in the solicitation, the contracting officer shall insert in the solicitation the provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software in any solicitation containing the clause at 52.227-14, Rights in Data—General. The contractor's response will provide an aid in determining whether the clause should be used with *Alternate II* and/or *Alternate III*.

(h) The contracting officer shall normally insert the clause at 52.227-16, Additional Data Requirements, in solicitations and contracts involving experimental, developmental, research, or demonstration work (other than basic or applied research to be performed solely by a university or college where the contract amount will be \$500,000 or less) unless all the requirements for data are believed to be known at the time of contracting and specified in the contract. (See 27.406(b).) This clause may also be used in other contracts when considered appropriate.

(i) In accordance with 27.405(a), the contracting officer shall insert the clause at 52.227-17, Rights in Data—Special Works, in solicitations and contracts primarily for the production or compilation of data (other than limited rights data or restricted computer software) for the Government's internal use, or when there is a specific need to limit distribution and use of the data and/or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples of such contracts are set forth in 27.405(a). The contract may specify the purposes and conditions (including

time limitations) under which the data may be used, released or reproduced by the contractor for other than contract performance. Contracts for the production of audiovisual works, sound recordings, etc. may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the data is acquired.

(j) The contracting officer shall insert the clause at 52.227-18, Rights in Data—Existing Works, in solicitations and contracts exclusively for the acquisition, without modification, of existing audiovisual and similar works of the type set forth in 27.405(b)(1). The contract may set forth limitations consistent with the purposes for which the work is being acquired. The clause at 52.227-17, Rights in Data—Special Works, shall be used if existing works are to be modified, as by editing, translation, addition of subject matter, etc.

(k) In accordance with 27.405(b)(2), when contracting (other than from GSA's Multiple Award Schedule contracts) for the acquisition of existing computer software, the clause at 52.227-19, Commercial Computer Software—Restricted Rights, may be used in the solicitation and contract. In any event, the contracting officer shall assure that the contract contains terms to obtain sufficient rights for the Government to fulfill the need for which the software is being acquired and is otherwise consistent with 27.405(b)(2).

(l) If the contract is a Small Business Innovation Research (SBIR) contract, the clause at 52.227-20, Rights in Data—SBIR Program shall be used in all Phase I and Phase II contracts awarded under the Small Business Innovation Research Program established pursuant to Pub. L. 97-219 (The Small Business Innovation Development Act of 1982).

(m) While no specific clause of this subpart is required to be included in contracts solely for the acquisition, without disclosure prohibitions, of books, publications and similar items in the exact form in which such items exist prior to the request for purchase (i.e., the off-the-shelf purchase of such items), or in other contracts (e.g., contracts resulting from sealed bidding) where only existing data available without disclosure prohibitions is to be furnished, if reproduction rights are to be acquired the contract shall include terms addressing such rights. (See 27.405(b)(3).)

(n) Agencies may prescribe in their procedures, as appropriate, a clause consistent with the policy of 27.402 in contracts to be performed outside the

United States, its possessions, and Puerto Rico.

(o) Agencies may prescribe in their procedures the clause at 52.227-17, Rights in Data—Special Works, or prescribe, as appropriate, clauses consistent with the policy in 27.402 in contracts for architect-engineer services and construction work.

(p) Agencies may prescribe in their procedures, as appropriate, a clause consistent with the policy of 27.402 in contracts for management, operation, design, or construction of Government-owned research, development, or production facilities, and in contracts and subcontracts in support of programs being conducted at such facilities.

(q) In accordance with 27.406(d), the contracting officer shall insert the clause at 52.227-21, Technical Data Certification, Revision, and Withholding of Payment—Major Systems, in contracts for major systems acquisitions or for support of major systems acquisitions. When used, this clause requires that the technical data to which it applies be specified in the contract. (See 27.406(d).)

(r) In the case of civilian agencies except NASA and the U.S. Coast Guard, the contracting officer shall insert the clause at 52.227-21, Major System—Minimum Rights, in contracts for major systems or contracts in support of major systems.

(s) In accordance with 27.407, if a contracting officer desires to acquire unlimited rights in technical data contained in a successful proposal upon which a contract award is based, the contracting officer shall insert the clause at 52.227-23, Rights to Proposed Data (Technical). Rights to technical data in a proposal are not acquired by mere incorporation by reference of the proposal in the contract, and if a proposal is incorporated by reference, § 27.404 must be followed to assure that such rights are appropriately addressed.

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Sections 52.227-14 through 52.227-23 are added to read as follows:

### 52.227-14 Rights in data—general.

As prescribed in 27.409(a), insert the following clause with any appropriate alternates:

#### Rights in Data—General (June 1987)

##### (a) Definitions.

"Computer software," as used in this clause, means computer programs, computer data bases, and documentation thereof.

"Data," as used in this clause, means recorded information, regardless of form or

the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

"Form, fit, and function data," as used in this clause, means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, mating, and attachment characteristics, functional characteristics, and performance requirements; except that for computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.

"Limited rights," as used in this clause, means the rights of the Government in limited rights data as set forth in the Limited Rights Notice of subparagraph (g)(2) if included in this clause.

"Limited rights data," as used in this clause, means data (other than computer software) that embody trade secrets or are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components, or processes developed at private expense, including minor modifications thereof.

"Restricted computer software," as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software; including minor modifications of such computer software.

"Restricted rights," as used in this clause, means the rights of the Government in restricted computer software, as set forth in a Restricted Rights Notice of subparagraph (g)(3) if included in this clause, or as otherwise may be provided in a collateral agreement incorporated in and made part of this contract, including minor modifications of such computer software.

"Technical data," as used in this clause, means data (other than computer software) which are of a scientific or technical nature.

"Unlimited rights," as used in this clause, means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

(b) *Allocations of rights.* (1) Except as provided in paragraph (c) of this clause regarding copyright, the Government shall have unlimited rights in—

(i) Data first produced in the performance of this contract;

(ii) Form, fit, and function data delivered under this contract;

(iii) Data delivered under this contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items.

components, or processes delivered or furnished for use under this contract; and

(iv) All other data delivered under this contract unless provided otherwise for limited rights data or restricted computer software in accordance with paragraph (g) of this clause.

(2) The Contractor shall have the right to—

(i) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract, unless provided otherwise in paragraph (d) of this clause;

(ii) Protect from unauthorized disclosure and use those data which are limited rights data or restricted computer software to the extent provided in paragraph (g) of this clause;

(iii) Substantiate use of, add or correct limited rights, restricted rights, or copyright notices and to take other appropriate action, in accordance with paragraphs (e) and (f) of this clause; and

(iv) Establish claim to copyright subsisting in data first produced in the performance of this contract to the extent provided in subparagraph (c)(1) of this clause.

(c) *Copyright.* (1) *Data first produced in the performance of this contract.* Unless provided otherwise in paragraph (d) of this clause, the Contractor may establish, without prior approval of the Contracting Officer, claim to copyright subsisting in scientific and technical articles based on or containing data first produced in the performance of this contract and published in academic, technical or professional journals, symposia proceedings or similar works. The prior, express written permission of the Contracting Officer is required to establish claim to copyright subsisting in all other data first produced in the performance of this contract. When claim to copyright is made, the Contractor shall affix the applicable copyright notices of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including contract number) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For data other than computer software the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the Contractor grants to the Government and others acting in its behalf, a paid-up nonexclusive, irrevocable worldwide license in such copyrighted computer software to reproduce, prepare derivative works, and perform publicly and display publicly by or on behalf of the Government.

(2) *Data not first produced in the performance of this contract.* The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data not first produced in the performance of this contract and which contains the copyright notice of 17 U.S.C. 401 or 402, unless the Contractor identifies such data and grants to

the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (c)(1) of this clause; *provided, however,* that if such data are computer software the Government shall acquire a copyright license as set forth in subparagraph (g)(3) of this clause if included in this contract or as otherwise may be provided in a collateral agreement incorporated in or made part of this contract.

(3) *Removal of copyright notices.* The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.

(d) *Release, publication and use of data.* (1) The Contractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract, except to the extent such data may be subject to the Federal export control or national security laws or regulations, or unless otherwise provided in this paragraph of this clause or expressly set forth in this contract.

(2) The Contractor agrees that to the extent it receives or is given access to data necessary for the performance of this contract which contain restrictive markings, the Contractor shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the Contracting Officer.

(e) *Unauthorized marking of data.* (1) Notwithstanding any other provisions of this contract concerning inspection or acceptance, if any data delivered under this contract are marked with the notices specified in subparagraph (g)(2) or (g)(3) of this clause and use of such is not authorized by this clause, or if such data bears any other restrictive or limiting markings not authorized by this contract, the Contracting Officer may at any time either return the data to the Contractor, or cancel or ignore the markings. However, the following procedures shall apply prior to canceling or ignoring the markings.

(i) The Contracting Officer shall make written inquiry to the Contractor affording the Contractor 30 days from receipt of the inquiry to provide written justification to substantiate the propriety of the markings;

(ii) If the Contractor fails to respond or fails to provide written justification to substantiate the propriety of the markings within the 30-day period (or a longer time not exceeding 90 days approved in writing by the Contracting Officer for good cause shown), the Government shall have the right to cancel or ignore the markings at any time after said period and the data will no longer be made subject to any disclosure prohibitions.

(iii) If the Contractor provides written justification to substantiate the propriety of the markings within the period set in subdivision (e)(1)(i) of this clause, the Contracting Officer shall consider such written justification and determine whether or not the markings are to be cancelled or ignored. If the Contracting Officer determines that the markings are authorized, the Contractor shall be so notified in writing. If the Contracting Officer determines, with concurrence of the head of the contracting

activity, that the markings are not authorized, the Contracting Officer shall furnish the Contractor a written determination, which determination shall become the final agency decision regarding the appropriateness of the markings unless the Contractor files suit in a court of competent jurisdiction within 90 days of receipt of the Contracting Officer's decision. The Government shall continue to abide by the markings under this subdivision (e)(1)(iii) until final resolution of the matter either by the Contracting Officer's determination becoming final (in which instance the Government shall thereafter have the right to cancel or ignore the markings at any time and the data will no longer be made subject to any disclosure prohibitions), or by final disposition of the matter by court decision if suit is filed.

(2) The time limits in the procedures set forth in subparagraph (e)(1) of this clause may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request thereunder.

(3) This paragraph (e) does not apply if this contract is for a major system or for support of a major system by a civilian agency other than NASA and the U.S. Coast Guard agency subject to the provisions of Title III of the Federal Property and Administrative Services Act of 1949.

(4) Except to the extent the Government's action occurs as the result of final disposition of the matter by a court of competent jurisdiction, the Contractor is not precluded by this paragraph (e) from bringing a claim under the Contract Disputes Act, including pursuant to the Disputes clause of this contract, as applicable, that may arise as the result of the Government removing or ignoring authorized markings on data delivered under this contract.

(f) *Omitted or incorrect markings.*

(1) Data delivered to the Government without either the limited rights or restricted rights notice as authorized by paragraph (g) of this clause, or the copyright notice required by paragraph (c) of this clause, shall be deemed to have been furnished with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the Contractor may request, within 6 months (or a longer time approved by the Contracting Officer for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Contractor's expense, and the Contracting Officer may agree to do so if the Contractor—

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to the disclosure, use, or reproduction of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The Contracting Officer may also (i) permit correction at the Contractor's expense

of incorrect notices if the Contractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized, or (ii) correct any incorrect notices.

(g) *Protection of limited rights data and restricted computer software.*

(1) When data other than that listed in subdivisions (b)(1) (i), (ii), and (iii) of this clause are specified to be delivered under this contract and qualify as either limited rights data or restricted computer software, if the Contractor desires to continue protection of such data, the Contractor shall withhold such data and not furnish them to the Government under this contract. As a condition to this withholding, the Contractor shall identify the data being withheld and furnish form, fit, and function data in lieu thereof. Limited rights data that are formatted as a computer data base for delivery to the Government are to be treated as limited rights data and not restricted computer software.

(2) [Reserved]

(3) [Reserved]

(h) *Subcontracting.* The Contractor has the responsibility to obtain from its subcontractors all data and rights therein necessary to fulfill the Contractor's obligations to the Government under this contract. If a subcontractor refuses to accept terms affording the Government such rights, the Contractor shall promptly bring such refusal to the attention of the Contracting Officer and not proceed with subcontract award without further authorization.

(i) *Relationship to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

*Alternate I (Jun 1987).* As prescribed in 27.409(b), substitute the following definition for "Limited Rights Data" in paragraph (a) of the clause:

"Limited rights data," as used in this clause, means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

*Alternate II (Jun 1987).* As prescribed in 27.409(c), insert the following subparagraph (g)(2) in the clause:

(g)(2) Notwithstanding subparagraph (g)(1) of this clause, the contract may identify and specify the delivery of limited rights data, or the Contracting Officer may require by written request the delivery of limited rights data that has been withheld or would otherwise be withholdable. If delivery of such data is so required, the Contractor may affix the following "Limited Rights Notice" to the data and the Government will thereafter treat the data, subject to the provisions of paragraphs (e) and (f) of this clause, in accordance with such Notice:

**Limited Rights Notice (Jun 1987)**

(a) These data are submitted with limited rights under Government contract No. \_\_\_\_\_ (and subcontract \_\_\_\_\_, if appropriate). These data may be reproduced and used by the Government with the express limitation that they will not, without written permission

of the Contractor, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose these data outside the Government for the following purposes, if any, provided that the Government makes such disclosure subject to prohibition against further use and disclosure: [Agencies may list additional purposes as set forth in 27.404(d)(1) or if none, so state]

(b) This Notice shall be marked on any reproduction of these data, in whole or in part."

(End of notice)

*Alternate III (Jun 1987).* As prescribed in 27.409(d), insert the following subparagraph (g)(3) in the clause:

(g)(3)(i) Notwithstanding subparagraph (g)(1) of this clause, the contract may identify and specify the delivery of restricted computer software, or the Contracting Officer may require by written request the delivery of restricted computer software that has been withheld or would otherwise be withholdable. If delivery of such computer software is so required, the Contractor may affix the following "Restricted Rights Notice" to the computer software and the Government will thereafter treat the computer software, subject to paragraphs (e) and (f) of this clause, in accordance with the Notice:

**Restricted Rights Notice (Jun 1987)**

(a) This computer software is submitted with restricted rights under Government Contract No. \_\_\_\_\_ (and subcontract \_\_\_\_\_, if appropriate). It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this Notice or as otherwise expressly stated in the contract.

(b) This computer software may be—

(1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used or copied for use in a backup computer if any computer for which it was acquired is inoperative;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software incorporating restricted computer software are made subject to the same restricted rights;

(5) Disclosed to and reproduced for use by support service Contractors in accordance with subparagraphs (b) (1) through (4) of this clause, provided the Government makes such disclosure or reproduction subject to these restricted rights; and

(6) Used or copied for use in or transferred to a replacement computer.

(c) Notwithstanding the foregoing, if this computer software is published copyrighted computer software, it is licensed to the Government, without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause.

(d) Any other rights or limitations regarding the use, duplication, or disclosure of this

computer software are to be expressly stated in, or incorporated in, the contract.

(e) This Notice shall be marked on any reproduction of this computer software, in whole or in part."

(End of notice)

(ii) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

**Restricted Rights Notice**

*Short Form (Jun 1987)*

Use, reproduction, or disclosure is subject to restrictions set forth in Contract No. \_\_\_\_\_ (and subcontract \_\_\_\_\_, if appropriate) with \_\_\_\_\_ (name of Contractor and subcontractor)."

(End of notice)

(iii) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, it will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause, unless the Contractor includes the following statement with such copyright notice: "Unpublished—rights reserved under the Copyright Laws of the United States."

*Alternate IV (Jun 1987).* As prescribed in 27.409(e), substitute the following subparagraph (c)(1) in the clause:

(c) *Copyright.* (1) *Data First Produced in the Performance of the Contract.* Except as otherwise specifically provided in this contract, the Contractor may establish claim to copyright subsisting in any data first produced in the performance of this contract. When claim to copyright is made, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including contract number) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For data other than computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the Contractor grants to the Government and others acting on its behalf, a paid up, nonexclusive, irrevocable worldwide license for all such computer software to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government.

*Alternate V (Jun 1987)* As prescribed in 27.409(f), add the following paragraph (j) to the clause:

(j) The Contractor agrees, except as may be otherwise specified in this contract for specific data items listed as not subject to this paragraph, that the Contracting Officer or an authorized representative may, up to three years after acceptance of all items to be delivered under this contract, inspect at the Contractor's facility any data withheld

pursuant to paragraph (g)(1) of this clause, for purposes of verifying the Contractor's assertion pertaining to the limited rights or restricted rights status of the data or for evaluating work performance. Where the Contractor whose data are to be inspected demonstrates to the Contracting Officer that there would be a possible conflict of interest if the inspection were made by a particular representative, the Contracting Officer shall designate an alternate inspector.

#### 52.227-15 Representation of limited rights data and restricted computer software.

As prescribed in 27.409(g), insert the following provision in solicitations that include the clause at 52.227-14, Rights in Data—General:

##### Representation of Limited Rights Data and Restricted Computer Software (Jun 1987)

(a) This solicitation sets forth the work to be performed if a contract award results, and the Government's known delivery requirements for data (as defined in FAR 27.401). Any resulting contract may also provide the Government the option to order additional data under the Additional Data Requirements clause at 52.227-16 of the FAR, if included in the contract. Any data delivered under the resulting contract will be subject to the Rights in Data—General clause at 52.227-14 that is to be included in this contract. Under the latter clause, a Contractor may withhold from delivery data that qualify as limited rights data or restricted computer software, and deliver form, fit, and function data in lieu thereof. The latter clause also may be used with its Alternates II and/or III to obtain delivery of limited rights data or restricted computer software, marked with limited rights or restricted rights notices, as appropriate. In addition, use of Alternate V with this latter clause provides the Government the right to inspect such data at the Contractor's facility.

(b) As an aid in determining the Government's need to include any of the aforementioned Alternates in the clause at 52.227-14, Rights in Data—General, the offeror's response to this solicitation shall, to the extent feasible, complete the representation in paragraph (b) of this clause to either state that none of the data qualify as limited rights data or restricted computer software, or identify which of the data qualifies as limited rights data or restricted computer software. Any identification of limited rights data or restricted computer software in the offeror's response is not determinative of the status of such data should a contract be awarded to the offeror.

##### Representation Concerning Data Rights

Offeror has reviewed the requirements for the delivery of data or software and states (offeror check appropriate block)—

☐ None of the data proposed for fulfilling such requirements qualifies as limited rights data or restricted computer software.

☐ Data proposed for fulfilling such requirements qualify as limited rights data or restricted computer software and are identified as follows:

Note: "Limited rights data" and "Restricted computer software" are defined in the contract clause entitled "Rights In Data—General."

(End of provision)

#### 52.227-16 Additional data requirements.

As prescribed in 27.409(h), insert the following clause:

##### Additional Data Requirements (June 1987)

(a) In addition to the data (as defined in the clause at 52.227-14, Rights in Data—General clause or other equivalent included in this contract) specified elsewhere in this contract to be delivered, the Contracting Officer may, at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under this contract, order any data first produced or specifically used in the performance of this contract.

(b) The Rights in Data—General clause or other equivalent included in this contract is applicable to all data ordered under this Additional Data Requirements clause. Nothing contained in this clause shall require the Contractor to deliver any data the withholding of which is authorized by the Rights in Data—General or other equivalent clause of this contract, or data which are specifically identified in this contract as not subject to this clause.

(c) When data are to be delivered under this clause, the Contractor will be compensated for converting the data into the prescribed form, for reproduction, and for delivery.

(d) The Contracting Officer may release the Contractor from the requirements of this clause for specifically identified data items at any time during the 3-year period set forth in paragraph (a) of this clause.

#### 52.227-17 Rights in data—special works.

As prescribed in 27.409(i), insert the following clause:

##### Rights in Data—Special Works (June 1987)

(a) Definitions.

"Data," as used in this clause, means recorded information regardless of form or the medium on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing or management information.

"Unlimited rights," as used in this clause, means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) Allocation of Rights. (1) The Government shall have—

(i) Unlimited rights in all data delivered under this contract, and in all data first produced in the performance of this contract, except as provided in paragraph (c) of this clause for copyright.

(ii) The right to limit exercise of claim to copyright in data first produced in the performance of this contract, and to obtain assignment of copyright in such data, in accordance with subparagraph (c)(1) of this clause.

(iii) The right to limit the release and use of certain data in accordance with paragraph (d) of this clause.

(2) The Contractor shall have, to the extent permission is granted in accordance with subparagraph (c)(1) of this clause, the right to establish claim to copyright subsisting in data first produced in the performance of this contract.

(c) Copyright. (1) Data first produced in the performance of this contract.

(i) The Contractor agrees not to assert, establish, or authorize others to assert or establish, any claim to copyright subsisting in any data first produced in the performance of this contract without prior written permission of the Contracting Officer. When claim to copyright is made, the Contractor shall affix the appropriate copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including contract number) to such data when delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. The Contractor grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(ii) If the Government desires to obtain copyright in data first produced in the performance of this contract and permission has not been granted as set forth in subdivision (c)(1)(i) of this clause, the Contracting Officer may direct the Contractor to establish, or authorize the establishment of, claim to copyright in such data and to assign, or obtain the assignment of, such copyright to the Government or its designated assignee.

(2) Data not first produced in the performance of this contract. The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data not first produced in the performance of this contract and which contain the copyright notice of 17 U.S.C. 401 or 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (c)(1) of this clause.

(d) Release and use restrictions. Except as otherwise specifically provided for in this contract, the Contractor shall not use for purposes other than the performance of this contract, nor shall the Contractor release, reproduce, distribute, or publish any data first produced in the performance of this contract, nor authorize others to do so, without written permission of the Contracting Officer.

(e) Indemnity. The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability, including

costs and expenses, incurred as the result of the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication, or use of any data furnished under this contract; or any libelous or other unlawful matter contained in such data. The provisions of this paragraph do not apply unless the Government provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules, or regulations to participate in the defense thereof, and obtains the Contractor's consent to the settlement of any suit or claim other than as required by final decree of a court of competent jurisdiction; nor do these provisions apply to material furnished to the Contractor by the Government and incorporated in data to which this clause applies.

(End of clause)

#### 52.227-18 Rights in data—existing works.

As prescribed in 27.409(j), insert the following clause:

##### Rights in Data—Existing Works (June 1987)

(a) Except as otherwise provided in this contract, the Contractor grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government, for all the material or subject matter called for under this contract, or for which this clause is specifically made applicable.

(b) The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability, including costs and expenses, incurred as the result of (1) the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication or use of any data furnished under this contract; or (2) any libelous or other unlawful matter contained in such data. The provisions of this paragraph do not apply unless the Government provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules, or regulations to participate in the defense thereof, and obtains the Contractor's consent to the settlement of any suit or claim other than as required by final decree of a court of competent jurisdiction; and do not apply to material furnished to the Contractor by the Government and incorporated in data to which this clause applies.

(End of clause)

#### 52.227-19 Commercial computer software—restricted rights.

As prescribed in 27.409(k), insert the following clause:

##### Commercial Computer Software—Restricted Rights (June 1987)

(a) As used in this clause, "restricted computer software" means any computer program, computer data base, or documentation thereof, that has been

developed at private expense and either is a trade secret, is commercial or financial and confidential or—privileged, or is published and copyrighted.

(b) Notwithstanding any provisions to the contrary contained in any Contractor's standard commercial license or lease agreement pertaining to any restricted computer software delivered under this purchase order/contract, and irrespective of whether any such agreement has been proposed prior to or after issuance of this purchase order/contract or of the fact that such agreement may be affixed to or accompany the restricted computer software upon delivery, vendor agrees that the Government shall have the rights that are set forth in paragraph (c) of this clause to use, duplicate or disclose any restricted computer software delivered under this purchase order/contract. The terms and provisions of this contract, including any commercial lease or license agreement, shall be subject to paragraph (c) of this clause and shall comply with Federal laws and the Federal Acquisition Regulation.

(c)(1) The restricted computer software delivered under this contract may not be used, reproduced or disclosed by the Government except as provided in subparagraph (c)(2) of this clause or as expressly stated otherwise in this contract.

(2) The restricted computer software may be—

(i) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(ii) Used or copied for use in or with backup computer if any computer for which it was acquired is inoperative;

(iii) Reproduced for safekeeping (archives) or backup purposes;

(iv) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software incorporating any of the delivered, restricted computer software shall be subject to same restrictions set forth in this purchase order/contract;

(v) Disclosed to and reproduced for use by support service Contractors or their subcontractors, subject to the same restrictions set forth in this purchase order/contract; and

(vi) Used or copied for use in or transferred to a replacement computer.

(3) If the restricted computer software delivered under this purchase order/contract is published and copyrighted, it is licensed to the Government, without disclosure prohibitions, with the rights set forth in subparagraph (c)(2) of this clause unless expressly stated otherwise in this purchase order/contract.

(4) To the extent feasible the Contractor shall affix a Notice substantially as follows to any restricted computer software delivered under this purchase order/contract; or, if the vendor does not, the Government has the right to do so: "Notice—Notwithstanding any other lease or license agreement that may pertain to, or accompany the delivery of, this computer software, the rights of the Government regarding its use, reproduction

and disclosure are as set forth in Government Contract (or Purchase Order) No. \_\_\_\_\_)

(d) If any restricted computer software is delivered under this contract with the copyright notice of 17 U.S.C. 401, it will be presumed to be published and copyrighted and licensed to the Government in accordance with subparagraph (c)(3) of this clause, unless a statement substantially as follows accompanies such copyright notice: "Unpublished—rights reserved under the copyright laws of the United States."

(End of clause)

#### 52.227-20 Rights in data—SBIR program.

As prescribed in 27.409(1), insert the following clause:

##### Rights in Data—SBIR Program (June 1987)

###### (a) Definitions.

"Computer software," as used in this clause, means computer programs, computer data bases, and documentation thereof.

"Data," as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing or management information.

"Form, fit, and function data," as used in this clause, means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements except that for computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.

"Limited rights data," as used in this clause, means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

"Restricted computer software," as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and confidential or privileged; or is published copyrighted computer software; including modifications of such computer software.

"SBIR data," as used in this clause, means data first produced by a Contractor that is a small business firm in performance of a small business innovation research contract issued under the authority of 15 U.S.C. 638 (Pub. L. 97-219, Small Business Innovation Development Act of 1982), which data are not generally known, and which data without obligation as to its confidentiality have not been made available to others by the Contractor or are not already available to the Government.

"SBIR rights," as used in this clause, mean the rights in SBIR data set forth in the SBIR Rights Notice of paragraph (d) of this clause.

"Technical data," as used in this clause, means that data which are of a scientific or technical nature.

"Unlimited rights," as used in this clause, means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of rights.* (1) Except as provided in paragraph (c) of this clause regarding copyright, the Government shall have unlimited rights in—

(i) Data specifically identified in this contract as data to be delivered without restriction;

(ii) Form, fit, and function data delivered under this contract;

(iii) Data delivered under this contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this contract; and

(iv) All other data delivered under this contract unless provided otherwise for SBIR data in accordance with paragraph (d) of this clause or for limited rights data or restricted computer software in accordance with paragraph (g) of this clause.

(2) The Contractor shall have the right to—

(i) Protect SBIR rights in SBIR data delivered under this contract in the manner and to the extent provided in paragraph (d) of this clause;

(ii) Withhold from delivery those data which are limited rights data or restricted computer software to the extent provided in paragraph (g) of this clause;

(iii) Substantiate use of, add, or correct SBIR rights or copyrights notices and to take other appropriate action, in accordance with paragraph (e) of this clause; and

(iv) Establish claim to copyright subsisting in data first produced in the performance of this contract to the extent provided in subparagraph (c)(1) of this clause.

(c) *Copyright.* (1) *Data first produced in the performance of this contract.* Except as otherwise specifically provided in this contract, the Contractor may establish claim to copyright subsisting in any data first produced in the performance of this contract. If claim to copyright is made, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including contract number) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For data other than computer software the Contractor grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government, for all such data. For computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license for all such computer software to reproduce,

prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government.

(2) *Data not first produced in the performance of this contract.* The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data that are not first produced in the performance of this contract and that contain the copyright notice of 17 U.S.C. 401 or 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (c)(1) of this clause.

(3) *Removal of copyright notices.* The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.

(d) *Rights to SBIR data.* (1) The Contractor is authorized to affix the following "SBIR Rights Notice" to SBIR data delivered under this contract and the Government will thereafter treat the data, subject to the provisions of paragraphs (e) and (f) of this clause, in accordance with such Notice:

#### SBIR Rights Notice (Jun 1987)

These SBIR data are furnished with SBIR rights under Contract No. \_\_\_\_\_ (and subcontract \_\_\_\_\_ if appropriate). For a period of 2 years after acceptance of all items to be delivered under this contract, the Government agrees to use these data for Government purposes only, and they shall not be disclosed outside the Government (including disclosure for procurement purposes) during such period without permission of the Contractor, except that, subject to the foregoing use and disclosure prohibitions, such data may be disclosed for use by support Contractors. After the aforesaid 2-year period the Government has a royalty-free license to use, and to authorize others to use on its behalf, these data for Government purposes, but is relieved of all disclosure prohibitions and assumes no liability for unauthorized use of these data by third parties. This Notice shall be affixed to any reproductions of these data, in whole or in part.

(End of notice)

(2) The Government's sole obligation with respect to any SBIR data shall be as set forth in this paragraph (d).

(e) *Omitted or incorrect markings.* (1) Data delivered to the Government without any notice authorized by paragraph (d) of this clause, and without a copyright notice, shall be deemed to have been furnished with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of such data. However, to the extent the data have not been disclosed without restriction outside the Government, the Contractor may request, within six months (or a longer time approved by the Contracting Officer for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Contractor's expense, and the Contracting Officer may agree to do so if the Contractor—

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to the disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The Contracting Officer may also (i) permit correction, at the Contractor's expense, of incorrect notices if the Contractor identifies the data on which correction of the notice is to be made and demonstrates that the correct notice is authorized, or (ii) correct any incorrect notices.

(f) *Protection of limited rights data.* When data other than that listed in subdivisions (b)(1) (i), (ii), and (iii) of this clause are specified to be delivered under this contract and such data qualify as either limited rights data or restricted computer software, the Contractor, if the Contractor desires to continue protection of such data, shall withhold such data and not furnish them to the Government under this contract. As a condition to this withholding the Contractor shall identify the data being withheld and furnish form, fit, and function data in lieu thereof.

(g) *Subcontracting.* The Contractor has the responsibility to obtain from its subcontractors all data and rights therein necessary to fulfill the Contractor's obligations to the Government under this contract. If a subcontractor refuses to accept terms affording the Government such rights, the Contractor shall promptly bring such refusal to the attention of the Contracting Officer and not proceed with subcontract award without further authorization.

(h) *Relationship to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

(End of clause)

#### 52.227-21 Technical data certification, revision, and withholding of payment—major systems.

As prescribed in 27.409(q), insert the following clause:

#### Technical Data Certification, Revision, and Withholding of Payment—Major Systems (Jun 1987)

(a) *Scope of clause.* This clause shall apply to all technical data (as defined in the Rights in Data—General clause included in this contract) that have been specified in this contract as being subject to this clause. It shall apply to all such data delivered, or required to be delivered, at any time during contract performance or within 3 years after acceptance of all items (other than technical data) delivered under this contract unless a different period is set forth herein. The Contracting Officer may release the Contractor from all or part of the requirements of this clause for specifically identified technical data items at any time during the period covered by this clause.

(b) *Technical data certification.* (1) All technical data that are subject to this clause shall be accompanied by the following certification upon delivery:

**Technical Data Certification (Jun 1987)**

The Contractor, \_\_\_\_\_, hereby certifies that to the best of its knowledge and belief the technical data delivered herewith under Government contract No. \_\_\_\_\_ (and subcontract \_\_\_\_\_, if appropriate) are complete, accurate, and comply with the requirements of the contract concerning such technical data.

(End of certification)

(2) The Government shall rely on the certification set out in subparagraph (b)(1) of this clause in accepting delivery of the technical data, and in consideration thereof may, at any time during the period covered by this clause, request correction of any deficiencies which are not in compliance with contract requirements. Such corrections shall be made at the expense of the Contractor. Unauthorized markings on data shall not be considered a deficiency for the purpose of this clause, but will be treated in accordance with paragraph (e) of the Rights in Data—General clause included in this contract.

(c) *Technical data revision.* The Contractor also agrees, at the request of the Contracting Officer, to revise technical data that are subject to this clause to reflect engineering design changes made during the performance of this contract and affecting the form, fit, and function of any item (other than technical data) delivered under this contract. The Contractor may submit a request for an equitable adjustment to the terms and conditions of this contract for any revisions to technical data made pursuant to this paragraph.

(d) *Withholding of payment.* (1) At any time before final payment under this contract the Contracting Officer may, in the Government's interest, withhold payment until a reserve not exceeding \$100,000 or 5 percent of the amount of this contract, whichever is less, if in the Contracting Officer's opinion respecting any technical data that are subject to this clause, the Contractor fails to—

(i) Make timely delivery of such technical data as required by this contract;

(ii) Provide the certification required by subparagraph (b)(1) of this clause;

(iii) Make the corrections required by subparagraph (b)(2) of this clause; or

(iv) Make revisions requested under paragraph (c) of this clause.

(2) Such reserve or balance shall be withheld until the Contracting Officer has determined that the Contractor has delivered the data and/or has made the required corrections or revisions. Withholding shall not be made if the failure to make timely delivery, and/or the deficiencies relating to delivered data, arose out of causes beyond the control of the Contractor and without the fault or negligence of the Contractor.

(3) The Contracting Officer may decrease or increase the sums withheld up to the sums authorized in subparagraph (d)(1) of this clause. The withholding of any amount under this paragraph, or the subsequent payment thereof, shall not be construed as a waiver of any Government rights.

(End of clause)

**52.227-22 Major system—minimum rights.**

As prescribed in 27.409(r), insert the following clause:

**Major System—Minimum Rights (Jun 1987)**

Notwithstanding any other provision of this contract, the Government shall have unlimited rights in any technical data, other than computer software, developed in the performance of this contract and relating to a major system or supplies for a major system procured or to be procured by the Government, to the extent that delivery of such technical data is required as an element of performance under this contract. The rights of the Government under this clause are in addition to and not in lieu of its rights under the other provisions of this contract.

(End of clause)

**52.227-23 Rights to proposal data (technical).**

As prescribed in 27.409(s), insert the following clause:

**Rights to Proposal Data (Technical) (Jun 1987)**

Except for data contained on pages \_\_\_\_\_, it is agreed that as a condition of award of this contract, and notwithstanding the conditions of any notice appearing thereon, the Government shall have unlimited rights (as defined in the "Rights in Data—General" clause contained in this contract) in and to the technical data contained in the proposal dated \_\_\_\_\_, upon which this contract is based.

(End of clause)

[FR Doc. 87-10843 Filed 5-12-87; 8:45 am]

BILLING CODE 6820-61-M

# **United States Federal Register**

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**Wednesday  
May 13, 1987**

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## **Part IV**

### **Department of Defense**

#### **General Services Administration**

#### **National Aeronautics and Space Administration**

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##### **48 CFR Part 31**

**Federal Acquisition Regulation (FAR);  
Trade, Business, Technical and  
Professional Activity Costs; Extraordinary  
Compensation and Certain Organization  
Costs in Connection With Mergers and  
Other Business Combinations (Golden  
Parachutes and Golden Handcuffs);  
Proposed Rules**

## DEPARTMENT OF DEFENSE

GENERAL SERVICES  
ADMINISTRATIONNATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION

## 48 CFR Part 31

Federal Acquisition Regulation (FAR);  
Trade, Business, Technical and  
Professional Activity Costs

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering changes to FAR 31.205-43, Trade, business, technical and professional activity costs, that are intended to clarify allowability policy.

**DATE:** Comments should be submitted to the FAR Secretariat at the address shown below on or before July 13, 1987, to be considered in the formulation of a final rule.

**ADDRESS:** Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets NW., Room 4041, Washington, DC 20405.

Please cite FAR Case 87-18 in all correspondence related to this issue.

**FOR FURTHER INFORMATION CONTACT:** Ms. Margaret A. Willis, FAR Secretariat, Telephone (202) 523-4755.

**SUPPLEMENTARY INFORMATION:****A. Background**

There has been a proliferation of non-Federal Government sponsored symposia resulting in possibly unreasonable costs being charged against Government contracts. In addition, Government contracting officers and auditors have found that the present cost principle does not address the attendance of company employees at such activities, it does not describe the circumstances in which the cost of attendance by noncontractor employees' costs might be allowable, and it does not distinguish between setting up or sponsoring meetings, conferences, symposia, and seminars and attending those events. This proposed rule was necessitated by a need to control costs, to clearly state the policy of the Government with respect to these costs, and to describe more specifically the nature of costs which are allowable. The proposed changes do not reflect or result from a change in allowability policy.

**B. Regulatory Flexibility Act**

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small entities are awarded on a competitive fixed-price basis and cost principles do not apply. An initial Regulatory Flexibility Analysis has therefore not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR Subpart will also be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite FAR Case 87-610 in correspondence.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act (Pub. L. 96-511) does not apply because this proposed change to FAR 31.205-43 provides clarifications as to the allowability of trade, business, technical and professional business activity costs, and does not impose any additional reporting or recordkeeping requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, *et seq.*

**List of Subjects in 48 CFR Part 31**

Government procurement.

Dated: May 1, 1987.

**Lawrence J. Rizzi,**  
Director, Office of Federal Acquisition and Regulatory Policy.

Therefore, it is proposed that 48 CFR Part 31 be amended as set forth below:

**PART 31—CONTRACT COST  
PRINCIPLES AND PROCEDURES**

1. The authority citation for Part 31 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. Ch. 137; and 42 U.S.C. 2473(c).

2. Section 31.205-43 is amended by revising paragraph (c) and the introductory text is republished to read as follows:

**31.205-43 Trade, business, technical and professional activity costs.**

The following types of costs are allowable:

\* \* \* \* \*

(c) When the principal purpose of a meeting, conference, symposium, or seminar is the dissemination of trade, business, technical or professional information, or the stimulation of production or improved productivity:

(1) Costs of organizing, setting up and sponsoring the meetings, symposia, etc., including rental of meeting facilities, transportation, subsistence, and incidental and directly associated costs.

(2) Costs of attendance by contractor employees, including travel costs (see 31.205-46).

(3) Costs of attendance by noncontractor personnel provided (i) such costs are not also reimbursed to the individual by the employing company or organization, and (ii) the individual's attendance is essential to achieve the purpose of the conference, meeting, symposium, etc.

[FR Doc. 87-10842 Filed 5-12-87; 8:45 am]

BILLING CODE 6820-61-M

## 48 CFR Part 31

Federal Acquisition Regulation (FAR);  
Extraordinary Compensation and  
Certain Organization Costs in  
Connection With Mergers and Other  
Business Combinations (Golden  
Parachutes and Golden Handcuffs)

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering revising FAR 31.205-6 and 31.205-27 to clarify the allowability of extraordinary compensation and certain organization costs incurred in connection with mergers and other business combinations.

**DATE:** Comments should be submitted to the FAR Secretariat at the address shown below on or before July 13, 1987, to be considered in the formulation of a final rule.

**ADDRESS:** Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets NW., Room 4041, Washington, DC 20405.

Please cite FAR Case 87-19 in all correspondence related to this issue.

**FOR FURTHER INFORMATION CONTACT:** Ms. Margaret A. Willis, FAR Secretariat, Telephone (202) 523-4755.

**SUPPLEMENTARY INFORMATION:****A. Background**

The Defense Acquisition Regulatory and Civilian Agency Acquisition Councils have been reviewing for some time the subject of business combinations, and particularly the

appropriate Government contract costing resulting from such combinations. This review has been occasioned both by the increased pace and size of such events in recent years, and also by the Councils' perception that existing regulations on certain aspects of this subject are inadequate. Of special concern are the costs of "golden parachutes" and "golden handcuffs," which are extraordinary payments above and beyond ordinary, customary, and reasonable compensation payments to employees for services rendered. Also of concern is the fact that there is no explicit coverage on the allowability of the costs of resisting a corporate takeover. In the special circumstances of Government procurement, in which companies' recorded cost structures are often directly reflected in price, the Councils believe the Government should not be at risk of paying higher prices simply because of ownership changes at its suppliers. Instead, the Councils have concluded that additional coverage at FAR 31.205-6 and 31.205-27 is necessary to protect the Government from having to bear the costs of special compensation arrangements and various organization costs often attendant upon business combinations.

#### B. Regulatory Flexibility Act

The proposed changes to FAR 31.205-6 and 31.205-27 are not expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C., *et seq.*) because most contracts awarded to small entities are awarded on a competitive fixed-price basis and the cost principles do not apply.

#### C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) does not apply because the proposed rule does not impose any

additional recordkeeping or information collection requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, *et seq.*

#### List of Subjects in 48 CFR Part 31

Government procurement.

Dated: May 4, 1987.

Lawrence J. Rizzi,  
Director, Office of Federal Acquisition and  
Regulatory Policy.

Therefore, it is proposed that 48 CFR Part 31 be amended as set forth below:

1. The authority citation for Part 31 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Ch. 137; and 42 U.S.C. 2473(c).

#### PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

2. Section 31.205-6 is amended by adding paragraph (l) to read as follows:

##### 31.205-6 Compensation for personal services.

(l) *Compensation incidental to business acquisitions.* The following costs are unallowable:

(1) Payments to employees under agreements in which they receive special compensation, in excess of the contractor's normal severance pay practice, if their employment terminates following a change in the management control over, or ownership of, the contractor or a substantial portion of its assets. These arrangements are commonly known as "golden parachutes."

(2) Payments to employees under plans introduced in connection with a change (whether actual or prospective) in the management control over, or ownership of, the contractor or a

substantial portion of its assets in which those employees receive special compensation, in addition to their normal pay, provided that they remain with the contractor for a specified period of time. These arrangements are commonly known as "golden handcuffs."

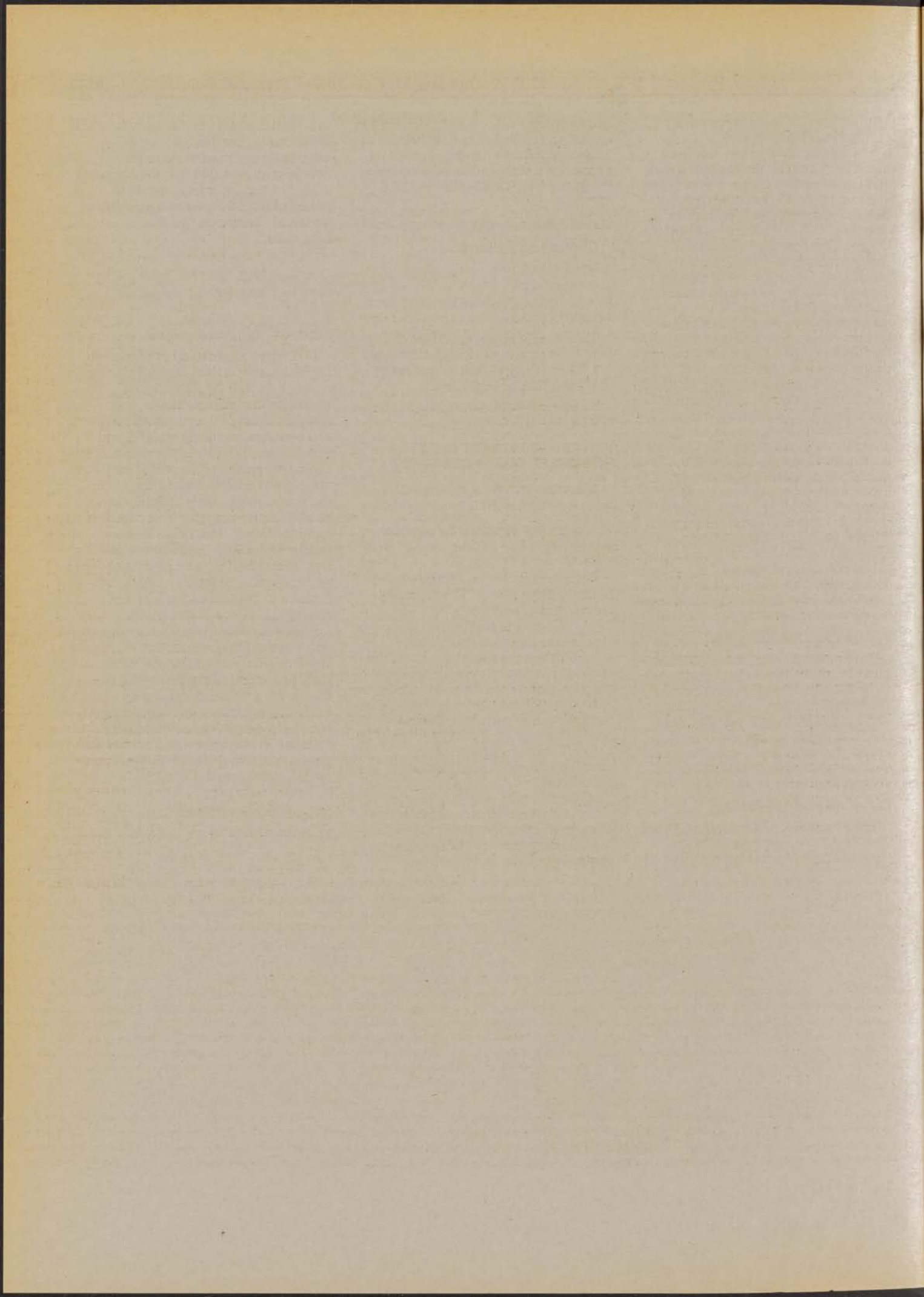
2. Section 31.205-27 is amended by revising paragraph (a) to read as follows:

##### 31.205-27 Organization costs.

(a) Except as provided in paragraph (b) of this subsection, expenditures in connection with (1) planning or executing the organization or reorganization of the corporate structure of a business, including mergers and acquisitions, (2) resisting or planning to resist the reorganization of the corporate structure of a business or a change in the controlling interest in the ownership of a business, and (3) raising capital (net worth plus long-term liabilities), are unallowable. Such expenditures include but are not limited to incorporation fees and costs of attorneys, accountants, brokers, promoters and organizers, management consultants and investment counselors, whether or not employees of the contractor. Unallowable "reorganization" costs include the cost of any change in the contractor's financial structure, excluding administrative costs of short-term borrowings for working capital, resulting in alterations in the rights and interests of security holders, whether or not additional capital is raised.

[FR Doc. 87-10841 Filed 5-12-87; 8:45 am]

BILLING CODE 6820-61-M



# Best of Part Federal

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Wednesday  
May 13, 1987

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## Part V

### Department of Health and Human Services

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Food and Drug Administration

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21 CFR Part 870

Cardiovascular Devices; Effective Date of  
Requirement for Premarket Approval;  
Replacement Heart Valve; Final Rule

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Food and Drug Administration

## 21 CFR Part 870

[Docket No. 85N-0331]

## Cardiovascular Devices; Effective Date of Requirement for Premarket Approval; Replacement Heart Valve

AGENCY: Food and Drug Administration.

ACTION: Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is issuing a final rule to require the filing of a premarket approval application or a notice of completion of a product development protocol for the replacement heart valve, a medical device. This action is being taken under the Medical Device Amendments of 1976.

EFFECTIVE DATE: December 9, 1987.

## FOR FURTHER INFORMATION CONTACT:

Arthur A. Ciarkowski, Center for Devices and Radiological Health (HFZ-450), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7559.

**SUPPLEMENTARY INFORMATION:** In the Federal Register of February 5, 1980 (45 FR 7948), FDA published a final rule (21 CFR 870.3925) classifying into class III (premarket approval) the replacement heart valve, a medical device. Section 870.3925 applies to (1) any replacement heart valve that was in commercial distribution before May 28, 1976, and (2) any device that FDA has found to be substantially equivalent to a replacement heart valve described in (1) and that has been marketed on or after May 28, 1976.

In the Federal Register of February 12, 1986 (51 FR 5296), FDA published a proposed rule to require the filing under section 515(b) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360e(b)) of a premarket approval application (PMA) or a notice of completion of a product development protocol (PDP) for the replacement heart valve. In accordance with section 515(b)(2)(A) of the act, FDA included in the preamble to the proposal the agency's proposed findings with respect to the degree of risk of illness or injury designed to be eliminated or reduced by requiring the device to meet the premarket approval requirements of the act, and the benefit to the public from use of the device (51 FR 5297). The agency also provided an opportunity for interested persons to submit comments on the proposed rule and the agency's proposed findings, and, under section

515(b)(2)(B) of the act, provided an opportunity for interested persons to request a change in the classification of the device based on new information relevant to its classification. Any petition requesting a change in the classification of the replacement heart valve was required to be submitted by February 27, 1986. The comment period closed on April 14, 1986.

Although FDA did not receive any petitions requesting a change in the classification of the replacement heart valve, the agency received one comment in response to the proposal of February 12, 1986. The comment from a trade association did not relate to the proposal, but referred to FDA's guidance relating to replacement heart valves.

FDA has reexamined its proposed findings with respect to the degree or risk of illness or injury designed to be eliminated or reduced by requiring the replacement heart valve to meet the statute's approval requirements. The agency concludes that its proposed findings and its conclusion discussed in the preamble to the proposed rule are appropriate. Accordingly, FDA is promulgating a final rule requiring premarket approval for the replacement heart valve under section 515(b)(3) of the act and is summarizing its findings with respect to the degree of risk of illness or injury designed to be eliminated or reduced by requiring the replacement heart valve to have an approved PMA or declared completed PDP, and the benefits to the public from the use of the device.

## I. Findings With Respect to Risks and Benefits

## A. Degree of Risk

1. *Mechanical failure of replacement heart valve.* Replacement heart valves tend to fail in characteristic ways. They may fail mechanically due to chemical or physical changes in portions of the valve, defects in materials, or faulty manufacturing processes. Failure mode may be slow or sudden. If the valve fails slowly, congestive heart failure may result and reoperation will be required. Rapid failure results in the need for urgent reoperation, or may result in death.

2. *Unacceptable hemodynamic performance.* A replacement heart valve may produce unacceptable hemodynamic performance, thus eliminating or reducing the benefits expected from surgery. Unacceptable hemodynamic performance usually requires reoperation for correction.

3. *Perivalvular leak.* The incidence of perivalvular leakage depends on the replacement heart valve design, the

condition of heart tissue at the site of implantation, and surgical technique, and may result from infection around the valve. Perivalvular leaks may develop early or late after implantation, may be of mild to severe degree, and may be associated with hemolytic anemia or congestive heart failure of such severity as to require reoperation.

4. *Surgical procedure.* The operation required to implant a replacement heart valve is not without risk. The morbidity and mortality associated with heart valve replacement are comparable to other open heart cardiac surgical procedures.

5. *Thrombus (blood clot) formation on the device.* The incidence of valve thrombus formation varies with the replacement heart valve design and placement of the valve in the mitral, aortic, or tricuspid position. In addition, the amount and type of anticoagulation hemodynamics and indigenous patient factors affect the incidence of valve-related thrombus.

6. *Thromboembolism.* Clots formed in the heart may break off and travel to various other organs, which are then damaged by loss of blood supply. The greater the loss of blood supply, the greater the damage to the affected organ. The incidence of thromboembolism is affected by the valve design and position and is decreased by the use of anticoagulant drugs.

7. *Anticoagulant complications.* Although careful medical followup is required, anticoagulant drugs significantly reduce the incidence of thrombosis and thromboembolism after the implantation of replacement heart valves constructed entirely of prosthetic materials.

8. *Hemolytic anemia.* Because of exposure of blood to an artificial surface, turbulent blood flow, and shear forces, a replacement heart valve produces some hemolysis (breakdown of red blood cells).

9. *Infection.* A replacement heart valve may become the site of infection, either at the time of surgery or later, as a result of dental procedures, intravascular catheterization, or surgery elsewhere in the body. Infection can lead to a number of other injuries even in the presence of anticoagulants.

FDA concludes that these risks could be eliminated or reduced by requiring the replacement heart valve to undergo premarket approval.

## B. Benefits of the Device

The benefits of implantation of the replacement heart valve are unquestioned in patients with valvular

heart disease. Without the device, many such patients have a poor prognosis characterized by congestive heart failure, chest pain, arrhythmias, loss of consciousness, embolic phenomena, and death. For some abnormalities of the natural heart valve, there is no satisfactory alternative to valve replacement (Ref. 1). Deformity of natural heart valves, when severe enough to produce significant stenosis or incompetence, is irreversible. The abnormal circulatory dynamics that result can be controlled by medication only to a limited degree. Following implantation of a replacement heart valve, many patients became asymptomatic and others experience a marked improvement in heart function and exercise tolerance.

## II. Final Rule

Under section 515(b)(3) of the act, FDA is adopting the proposed findings as published in the preamble to the proposed rule and issuing this final rule to require premarket approval of the generic type of device, the replacement heart valve, by adding a new paragraph (c) to § 870.3925.

Under the final rule, a PMA or a notice of completion of a PDP is required to be filed on or before December 9, 1987, for any replacement heart valve that was in commercial distribution before May 28, 1976, or that has been found by FDA to be substantially equivalent to such a device on or before December 9, 1987. An approved PMA or a declared completed PDP is required to be in effect for any such device on or before June 6, 1988. (If FDA finds that continued availability of a replacement heart valve for which a PMA has been timely filed is necessary for the public health, FDA may, under section 515(D)(1)(B)(i) of the act, extend the 180-day period for taking action on the PMA). Any replacement heart valve that was not in commercial distribution before May 28, 1976, or that has not on or before December 9, 1987 been found by FDA to be substantially equivalent to a replacement heart valve that was in commercial distribution before May 28, 1976, is required to have an approved PMA or a declared completed PDP in effect before it may be marketed.

If a PMA or a notice of completion of a PDP for a replacement heart valve is not filed on or before December 9, 1987, that device will be deemed adulterated under section 501(f)(1)(A) of the act (21

U.S.C. 351(F)(1)(A)), and commercial distribution of the device will be required to cease. The device may, however, be distributed for investigational use, if the requirements of the investigational device exemption (IDE) regulations (21 CFR Part 812) are met.

Under § 812.2(d) of the IDE regulations, FDA hereby stipulates that the exemptions from the IDE requirements in § 812.2(c)(1) and (2) will no longer apply to clinical investigations of the replacement heart valve. Further, FDA concludes that investigational replacement heart valves are significant risk devices as defined in § 812.3(m), and advises that as of the effective date of § 870.3925(c) the requirements of the IDE regulations regarding significant risk devices will apply to any clinical investigation of a replacement heart valve. For any such device, therefore, an IDE submitted to FDA, under § 812.20, is required to be in effect under § 812.30 before an investigation is initiated or continued on or after December 9, 1987. FDA advises all persons who intend to sponsor any clinical investigation involving the replacement heart valve to submit an IDE application to FDA no later than November 9, 1987 to avoid the interruption of ongoing investigations.

## III. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(8) and (e) that this action is of a type that does not individually or cumulatively have significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

## IV. Economic Impact

FDA has examined the economic consequences of this final rule in accordance with the criteria in section 1(b) of Executive Order 12291 and found that the rule will not be a major rule as specified in the Order. The agency believes that eight firms will be affected by this rule. Therefore, the agency certifies under the Regulatory Flexibility Act (Pub. L. 96-354) that the rule will not have a significant economic impact on a substantial number of small entities. An assessment of the economic impact of this final rule has been placed on file in the Dockets Management Branch (HFA-305), Food and Drug Administration, Room 4-62, 5600 Fishers Lane, Rockville, MD 20857, and may be seen by

interested persons between 9 a.m. and 4 p.m., Monday through Friday.

## Reference

The following reference has been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Wheeler, E. D., et al., in "The Practice of Cardiology," edited by R. A. Johnson, E. Haber, and W. G. Austen, pp. 435, 479, and 496, Boston, 1980, Little, Brown & Co.

## List of Subjects in 21 CFR Part 870

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Part 870 is amended as follows:

## PART 870—CARDIOVASCULAR DEVICES

1. The authority citation for 21 CFR Part 870 continues to read as follows:

Authority: Sec. 501(f), 510, 513, 515, 520, 701(a), 52 Stat. 1055, 76 Stat. 794-795 as amended, 90 Stat. 540-546, 552-559, 565-574, 576-577 (21 U.S.C. 351(f), 360, 360c, 360e, 360j, 371(a)); 21 CFR 5.10.

2. Section 870.3925 is amended by adding new paragraph (c), to read as follows:

### § 870.3925 Replacement heart valve.

(c) *Date premarket approval application (PMA) or notice of completion of a product development protocol (PDA) is required.* A PMA or a notice of completion of a PDP is required to be filed with the Food and Drug Administration on or before December 9, 1987 for any replacement heart valve that was in commercial distribution before May 28, 1976, or that has on or before December 9, 1987 been found to be substantially equivalent to a replacement heart valve that was in commercial distribution before May 28, 1976. Any other replacement heart valve shall have an approved PMA or a declared completed PDP in effect before being placed in commercial distribution.

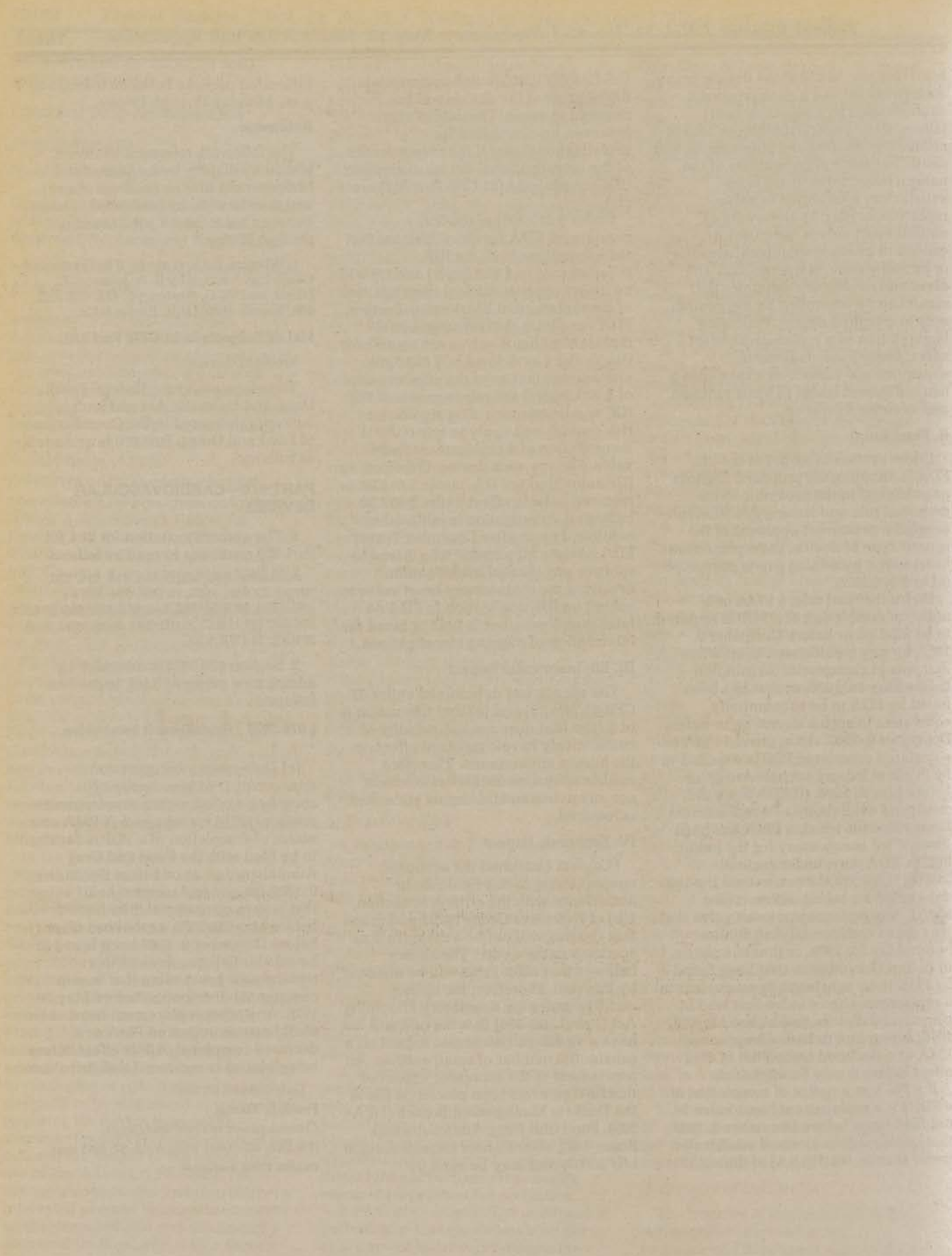
Dated: April 17, 1987.

Frank E. Young,

Commissioner of Food and Drugs.

[FR Doc. 87-10851 Filed 5-12-87; 8:45 am]

BILLING CODE 4160-01-M



# Registered Federal Paper

Wednesday  
May 13, 1987

## Part VI

## Department of Education

### Office of Elementary and Secondary Education

**Intent To Repay to the Robeson County,  
North Carolina Board of Education Funds  
Recovered as a Result of a Final Audit  
Determination; Notice of Intent To Award  
Grantback Funds**

**DEPARTMENT OF EDUCATION****Office of Elementary and Secondary Education****Intent To Repay to the Robeson County, NC Board of Education Funds Recovered as a Result of a Final Audit Determination****AGENCY:** Department of Education.**ACTION:** Intent to award grantback funds.

**SUMMARY:** Under section 456 of the General Education Provisions Act (GEPA), the Secretary of Education (Secretary) intends to repay under a grantback arrangement to the Robeson County Board of Education (local educational agency; LEA) an amount equal to 75 percent of funds recovered by the Department of Education as a result of a final audit determination. This notice describes the LEA's plan for the use of repaid funds and the terms and conditions under which the Secretary intends to make these funds available and invites comments on the proposed grantback.

**DATE:** All written comments must be received on or before June 12, 1987.**ADDRESS:** All written comments should be submitted to Mr. Hakim Khan, Acting Director, Indian Education Programs, U.S. Department of Education (Room 2177, FOB #6), 400 Maryland Avenue, SW., Washington, DC 20202-6267.**FOR FURTHER INFORMATION CONTACT:** Mr. Hakim Khan, (202) 732-1887.**SUPPLEMENTARY INFORMATION:****A. Background**

In May 1986, the Department of Education recovered \$50,000 from the LEA in satisfaction of an audit, covering the period from July 1, 1973 to June 30, 1976. The auditors examined the accounting procedures, procurement practices, and system of internal controls to determine the adequacy of the LEA's management policies and decisions affecting costs.

The auditors found that funds awarded under Part A of the Indian Education Act of 1972 (the Act), Title IV, Part A of Pub. L. 92-318 (20 U.S.C. 241aa through 241ff) had been misspent in violation of the Act's requirements as follows:

(1) Federal funds were not used to supplement but rather to supplant funds that would have been made available by the LEA in the absence of Federal funds (20 U.S.C. 241dd(a)(5));

(2) Federal funds were used to

purchase items and finance activities not provided for in the budget approved by the parent committee (20 U.S.C. 241dd(b)(2)(B)(ii));

(3) Federal funds were used for activities not specifically designed to meet the special educational or culturally related academic needs of Indian children (20 U.S.C. 241cc); and

(4) Federal funds were used for costs that were not adequately documented to demonstrate that the funds had benefitted Indian students (20 U.S.C. 241dd(a)(6)).

**B. Authority for Awarding a Grantback**

Section 456(a) of GEPA, 20 U.S.C. 1234e(a), provides that whenever the Secretary has recovered funds following a final audit determination with respect to an applicable program, the Secretary may consider those funds to be additional funds available for the program and may arrange to repay to the LEA affected by that determination an amount not to exceed 75 percent of the recovered funds. The Secretary may enter into this so-called "grantback" arrangement if the Secretary determines that the—

(1) Practices and procedures of the LEA that resulted in the audit determination have been corrected, and that the LEA is, in all other respects, in compliance with the requirements of the applicable program;

(2) LEA has submitted to the Secretary a plan for the use of the funds to be awarded under the grantback arrangement which meets the requirements of the program, and, to the extent possible, benefits the population that was affected by the failure to comply or by the misexpenditures that resulted in the audit exception; and

(3) Use of the funds to be awarded under the grantback arrangement in accordance with the LEA's plan would serve to achieve the purposes of the program under which the funds were originally granted.

**C. Plan for Use of Funds Awarded Under a Grantback Arrangement**

Pursuant to section 456(a)(2) of GEPA, the LEA has applied for a grantback of \$37,500 and has submitted a plan to use the grantback funds consistently with the Act. The LEA proposes to use the grantback funds to expand the computer-assisted instruction laboratory services that provide remedial instruction in reading and mathematics. The LEA's plan is available on request from the Department of Education contact person listed above.

**D. The Secretary's Determination**

The Secretary has carefully reviewed the plan and other information submitted by the LEA. Based upon that review, the Secretary has determined that the conditions under section 456 of GEPA have been met.

These determinations are based upon the best information available to the Secretary at the present time. If this information is not accurate or complete, the Secretary is not precluded from taking appropriate administrative action.

**E. Notice of the Secretary's Intent To Enter Into a Grantback Arrangement**

Section 456(d) of GEPA requires that, at least thirty days before entering into an arrangement to award funds under a grantback, the Secretary must publish in the *Federal Register* a notice of intent to do so, and the terms and conditions under which the payment will be made.

In accordance with section 456(d) of GEPA, notice is hereby given that the Secretary intends to make funds available to the Robeson County, North Carolina Public Schools under a grantback arrangement. The grantback award would be in the amount of \$37,500, which is 75 percent—the maximum percentage authorized by the statute—of the funds recovered by the Department as a result of the audit.

**F. Terms and Conditions Under Which Payment Under the Grantback Arrangement Will Be Made**

The LEA agrees to comply with the following terms and conditions under which payment under the grantback arrangement would be made:

(1) The funds awarded under the grantback must be spent in accordance with—

(a) All applicable statutory and regulatory requirements, and

(b) The plan that was submitted in conjunction with the LEA's request for a grantback dated May 20, 1986, and any amendments to that plan that are approved in advance by the Secretary.

(2) All funds received under the grantback arrangement must be expended not later than June 30, 1988, in accordance with the LEA's plan.

(3) The LEA must, not later than September 30, 1988, submit a report to the Secretary which—

(a) Indicates how the funds awarded under the grantback have been used;

(b) Shows that the funds awarded under the grantback have been liquidated; and

(c) Describes the results and effectiveness of the project for which the funds were spent.

(4) Separate accounting records must be maintained documenting the expenditures of funds awarded under the grantback arrangement.

Dated: May 7, 1987.

(Catalog of Federal Domestic Assistance  
Number: 84.060, Indian Education—Formula

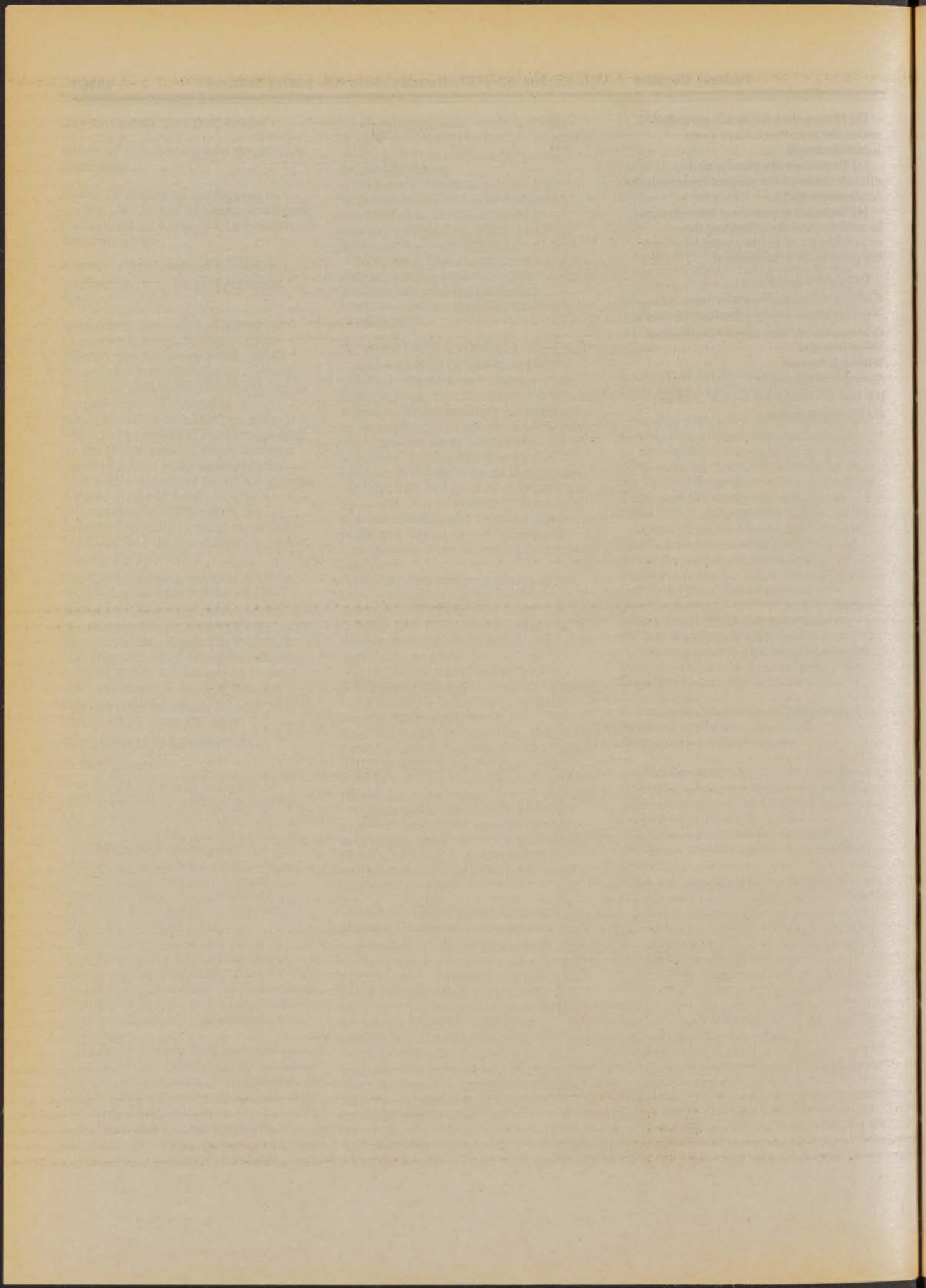
Grants to Local Educational Agencies and  
Tribal Schools)

**William J. Bennett,**

*Secretary of Education.*

[FR Doc. 87-10888 Filed 5-12-87; 8:45 am]

BILLING CODE 4000-01-M



# **Federal Register**

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**Wednesday  
May 13, 1987**

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## **Part VII**

### **Department of Transportation**

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**Federal Aviation Administration**

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**14 CFR Part 15**

**Administrative Claims Under the Federal  
Tort Claims Act; Final Rule**

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 15**

[Docket No. 25264; Adoption of Part 15]

**Administrative Claims Under the Federal Tort Claims Act****AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Final rule; request for comments.

**SUMMARY:** This final rule sets forth a new part for the Federal Aviation Regulations which requires prospective claimants under the Federal Tort Claims Act to follow certain procedures for filing their claims with the Federal Aviation Administration. The rule is needed because the current absence of a published rule of procedure has caused problems due to lack of knowledge by some parties as to how or where to file claims, and the minimum information which must be provided. The rule ensures that these claims are channeled to the appropriate division and expedites their evaluation by the FAA.

**DATE:** Effective date of this amendment is May 13, 1987. Comments must be received on or before June 12, 1987.

**ADDRESS:** Send comments on this final rule in duplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-204), Docket No. 25264, 800 Independence Avenue, SW., Washington, DC 20591; or deliver comments in duplicate to: Federal Aviation Administration Rules Docket, Room 916, 800 Independence Avenue, SW., Washington, DC 20591. Comments must be marked Docket No. 25264. Comments may be examined in the Rules Docket on weekdays except Federal holidays, between 8:30 a.m. and 5:00 p.m.

**FOR FURTHER INFORMATION CONTACT:** James S. Dillman, Assistant Chief Counsel, Litigation Division, AGC-400, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591. Telephone: (202) 267-3661.

**SUPPLEMENTARY INFORMATION:****Comments Invited**

This regulation is being adopted without notice and public comment. However, the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979) provide that, to the maximum extent possible, DOT operating administrations should provide an

opportunity for public comment, after issuance, for regulations issued without prior notice. Accordingly, interested persons are invited to comment on this final rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket and be submitted in duplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket, AGC-204, Docket No. 25264, 800 Independence Avenue, SW., Washington, DC 20591. All comments received will be available in the Rules Docket for examination by interested persons. This amendment may be changed in the light of comments received.

Commenters wishing the FAA to acknowledge receipt of their comments on this final rule must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 25264." The postcard will be date and time stamped and returned to the commenter.

**Background**

The FAA evaluates a significant number of claims against the agency arising under the Federal Tort Claims Act (FTCA). Between calendar years 1980 and 1985, the FAA received an average of 321 claims per year, with a total average amount claimed of almost \$7.0 billion per year. The largest number of claims were received in calendar year 1983 when 411 claims were presented. The highest dollar amount to be claimed in a single year occurred in 1984 when over \$21.0 billion in claims was presented. Thus, the FAA must deal with a significant number of claims involving sizeable sums of money.

The FTCA requires claims be presented to the appropriate Federal agency. 28 U.S.C. 2675(a). Claims must be in writing. 28 U.S.C. 2401(b). The Attorney General can prescribe regulations concerning the consideration, ascertainment, adjustment, determination, compromise, and settlement of claims brought under the Federal Tort Claims Act. 28 U.S.C. 2672. Federal agencies are authorized to issue regulations and establish procedures consistent with the regulations prescribed by the Attorney General. 28 CFR 14.11. The Administrator of the FAA is authorized to exercise the authority of the Secretary of Transportation as executive head of a department under any statute, Executive Order, or regulation. 49 CFR 1.45(a)(2). Under 49 CFR 1.47(a), the Federal Aviation Administration is delegated authority to carry out the powers and duties transferred to the Secretary of

Transportation by section 6(c)(1) of the Department of Transportation Act, 49 U.S.C. 1655(c)(1).

**The Final Rule**

There is currently no published rule of procedure informing the public how or where to file claims against the FAA under the FTCA. Such a rule is necessary for three reasons. First, some parties bringing claims against the FAA do not know how or where to file a claim. Second, sometimes claims are presented at remote FAA locations and to FAA personnel who do not understand the nature of the claim, or the statutory and regulatory requirements involved. For these reasons, FAA evaluation of the merits of the claim is frequently delayed. To remedy this, the rule specifies where and with whom claims must be filed.

The third reason for the rule is that the FAA receives some claims which cannot be adjudicated because they are incomplete or otherwise defective. The rule stipulates the minimum information that claimants must provide the FAA before their claim is deemed presented to the agency. Also, the rule lists additional information which the FAA may require the claimant to provide so that the claim can be adequately evaluated.

**Reason for No Notice and Immediate Adoption**

This amendment is needed to ensure that claimants know where to correctly file their claims against the agency and what information must be filed with their claims. It does not provide for any change in agency policy nor affect the substantive rights of the claimant. It merely provides notice of current agency practice.

For these reasons, notice and public procedure are unnecessary, and good cause exists for making this amendment effective in less than 30 days. Moreover, publication for prior comment would not reasonably be expected to result in the receipt of useful information on these procedural requirements. In accordance with DOT Regulatory Policies and Procedures, an opportunity for public comment after publication is being provided.

**Economic Assessment**

The rule sets out procedures which prospective claimants must follow to have their claims evaluated by the agency. The rule imposes no greater burden than that already required by 28 CFR Part 14. However, 28 CFR Part 14 does not stipulate when, where, and with whom to file claims.

The rule does not affect the national economy, and it is unrelated to events which would produce a major increase in costs or prices for consumers, individual industries, governmental authorities or agencies, or geographic regions. Industry, government, and geographical regions are outside the scope of the rule. The effect of the rule on a prospective claimant is minimal since it merely states publicly that information which the agency would otherwise require of the claimant to substantiate the claim.

For those claimants who would have hand-delivered or mailed their claim to any FAA facility, the requirements may impose additional postage costs, but those costs are negligible. Finally, the new rule does not address matters which affect competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Since the impact of the rule is minimal, no full Regulatory Evaluation is necessary.

#### Trade Impact Assessment

The rule will have no impact on international trade. The subject of the rule is unrelated to the manufacture or distribution of aviation-related products and services either by United States-based manufacturers and air carriers or foreign-based manufacturers and air carriers.

#### Regulatory Impact Determination

The vast majority of claims filed against the FAA under the FTCA are filed by individuals. Small entities seldom file claims against the FAA. Accordingly, the number of small entities that will be affected by the new rule is not substantial.

Additionally, the rule will not have a significant economic impact on the transaction costs of those small entities filing claims against the FAA. Conceivably, those claimants who would have hand-delivered or mailed their claim to any FAA facility may be required by the new rule to pay additional postage costs in order to properly file their claim. These additional costs do not constitute a significant economic impact on prospective claimants. While the rule is expected to increase the efficiency with which the FAA processes these claims, no monetary benefits are expected to accrue to the claimant as a result. Therefore, the number of small entities who would be affected by the rule is not expected to be substantial and the rule is not expected to have a significant economic impact, positive or negative.

Accordingly, a regulatory flexibility analysis is not required.

#### Conclusion

Because the rule inserts into 14 CFR requirements which are already in place in 28 CFR Part 14, the FAA has determined that the rule involves a regulation which is not major under Executive Order 12291 or significant under the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). Since very few, if any, small entities would be affected by the rule, and only minimal postage costs are involved, it is certified that under the criteria of the Regulatory Flexibility Act the rule will not have a significant economic impact, positive or negative, on a substantial number of entities. Because of the absence of any costs attendant with the rule, the FAA has determined that the expected impact of the regulation is so minimal that it does not warrant a full regulatory evaluation.

#### List of Subjects in 14 CFR Part 15

Federal Tort Claims Act, Administrative claims, Air transportation, Aircraft, Airports, Airplanes, Helicopters, Rotorcraft, Helicopters.

#### The Amendment

Accordingly, the Federal Aviation Administration amends Chapter I, Subchapter B, Procedural Rules, of Title 14 of the Code of Federal Regulations by adding a new Part 15 (14 CFR Part 15) to read as follows:

#### PART 15—ADMINISTRATIVE CLAIMS UNDER FEDERAL TORT CLAIMS ACT

##### Sec.

- 15.1 Scope of regulations.
- 15.3 Administrative claim, when presented; appropriate office.
- 15.5 Administrative claim, who may file.
- 15.7 Administrative claims; evidence and information to be submitted.
- 15.9 Investigation and examination.

Authority: 49 U.S.C. 1354; 5 U.S.C. 301; 28 U.S.C. 2672, 2675; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983).

##### § 15.1 Scope of regulations.

(a) These regulations apply to claims asserted under the Federal Tort Claims Act, as amended, for money damages against the United States for injury to, or loss of property, or for personal injury or death, caused by the negligent or wrongful act or omission of an employee of the FAA acting within the scope of office or employment. The regulations in this part supplement the Attorney General's regulations in 28 CFR Part 14, as amended. The regulations in 28 CFR

Part 14, as amended, and the regulations in this part apply to consideration by the FAA of administrative claims under the Federal Tort Claims Act.

##### § 15.3 Administrative claim, when presented; appropriate office.

(a) A claim is deemed to have been presented when the FAA receives, at a place designated in paragraph (b) of this section, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to, or loss of, property or for personal injury or death, alleged to have occurred by reason of the incident. A claim which should have been presented to the FAA but which was mistakenly filed with another Federal agency, is deemed presented to the FAA on the date the claim is received by the FAA at a place designated in paragraph (b) of this section. A claim addressed to, or filed with, the FAA by mistake will be transferred to the appropriate Federal agency, if that agency can be determined, or returned to the claimant.

(b) Claims shall be delivered or mailed to: Assistant Chief Counsel for Litigation, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591.

Alternatively, claims may be delivered or mailed to: Office of the Regional Counsel, in any of the FAA Regional Offices.

(c) Claim forms are available at each location listed in paragraph (b) of this section.

(d) A claim presented in accordance with this section may be amended by the claimant at any time prior to final FAA action or prior to the exercise of the claimant's option, under 28 U.S.C. 2675(a), to deem the agency's failure to make a final disposition of his or her claim within 6 months after it was filed as a final denial. Each amendment to a claim shall be submitted in writing and signed by the claimant or the claimant's duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the FAA has 6 months thereafter in which to make a final disposition of the claim as amended, and the claimant's option under 28 U.S.C. 2675(a) does not accrue until 6 months after the filing of the amendment.

##### § 15.5 Administrative claim, who may file.

(a) A claim for injury to, or loss of, property may be presented by the owner of the property interest which is the subject of the claim or by the owner's duly authorized agent or legal representative.

(b) A claim for personal injury may be presented by the injured person or that person's duly authorized agent or legal representative.

(c) A claim based on death may be presented by the executor or administrator of the decedent's estate or by any other person legally entitled to assert such a claim under applicable State law.

(d) A claim for loss wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer. A claim for loss partially compensated by an insurer with the rights of a subrogee may be presented by the insurer or the insured individually, as their respective interest appear, or jointly. Whenever an insurer presents a claim asserting the rights of a subrogee, it shall present with its claim appropriate evidence that it has the rights of a subrogee.

(e) A claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

#### § 15.7 Administrative claims; evidence and information to be submitted.

(a) *Death.* In support of a claim based on death, the claimant may be required to submit the following evidence or information:

(1) An authenticated death certificate or other competent evidence showing cause of death, date of death, and age of the decedent.

(2) The decedent's employment or occupation at time of death, including monthly or yearly salary or earnings (if any), and the duration of last employment or occupation.

(3) Full names, addresses, birth dates, kinship, and marital status of the decedent's survivors, including identification of those survivors who were dependent for support upon the decedent at the time of death.

(4) Degree of support afforded by the decedent to each survivor dependent

upon decedent for support at the time of death.

(5) Decedent's general, physical, and mental conditions before death.

(6) Itemized bills for medical and burial expenses incurred by reason of the incident causing death or itemized receipts of payment for such expenses.

(7) If damages for pain and suffering prior to death are claimed, a physician's detailed statement specifying the injuries suffered, duration of pain and suffering, any drugs administered for pain, and the decedent's physical condition in the interval between injury and death.

(8) Any other evidence or information which may have a bearing on either the responsibility of the United States for the death or the amount of damages claimed.

(b) *Personal injury.* In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information:

(1) A written report by the attending physician or dentist setting forth the nature and extent of the injuries, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity.

(2) In addition to the report required by paragraph (b)(1) of this section, the claimant may be required to submit to a physical or mental examination by a physician employed by the FAA or another Federal agency. A copy of the report of the examining physician is made available to the claimant upon the claimant's written request if the claimant has, upon request, furnished the report required by paragraph (b)(1), and has made or agrees to make available to the FAA any other physician's reports previously or thereafter made on the physical or mental condition which is the subject matter of the claim.

(3) Itemized bills for medical, dental, and hospital expenses incurred or itemized receipts of payment for such expenses.

(4) If the prognosis reveals the necessity for future treatment, a

statement of expected expenses for such treatment.

(5) If a claim is made for loss of time from employment, a written statement from the claimant's employer showing actual time lost from employment, whether the claimant is a full or part-time employee, and wages or salary actually lost.

(6) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amount of earnings actually lost.

(7) Any other evidence or information which may have a bearing on the responsibility of the United States for the personal injury or the damages claimed.

(c) *Property damage.* In support of a claim for injury to or loss of property, real or personal, the claimant may be required to submit the following evidence or information:

(1) Proof of ownership of the property interest which is the subject of the claim.

(2) A detailed statement of the amount claimed with respect to each item of property.

(3) An itemized receipt of payment for necessary repairs or itemized written estimates of the cost of such repairs.

(4) A statement listing date of purchase, purchase price, and salvage value, where repair is not economical.

(5) Any other evidence or information which may have a bearing on either the responsibility of the United States for the injury to or loss of property or the damages claimed.

#### § 15.9 Investigation and examination.

The FAA may investigate a claim or conduct a physical examination of a claimant. The FAA may request any other Federal agency to investigate a claim or conduct a physical examination of a claimant and provide a report of the investigation or examination to the FAA.

Issued in Washington, DC, on May 5, 1987.

Donald D. Engen,  
Administrator.

[FR Doc. 87-10857 Filed 5-12-87; 8:45 am]  
BILLING CODE 4910-13-M

# Registered Federal Reporter

**Wednesday  
May 13, 1987**

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## **Part VIII**

## **Department of Education**

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**34 CFR Part 309**

**Handicapped Children's Early Education  
Program; Proposed Rule and Notices**

## DEPARTMENT OF EDUCATION

## 34 CFR Part 309

## Early Education for Handicapped Children

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** The Secretary proposes to amend the regulations governing the Handicapped Children's Early Education Program (HCEEP) authorized by section 623 of Part C of the Education of the Handicapped Act (EHA). These proposed regulations are needed to implement new requirements under the EHA amendments of 1986 (Pub. L. 99-457) and to revise selection criteria for awards under this program. The intended effect of these proposed regulations is to clarify statutory requirements and to improve the operation of the program.

**DATE:** Comments must be received on or before June 12, 1987.

**ADDRESSES:** All comments concerning these proposed regulations should be addressed to: Dr. Thomas R. Behrens, Office of Special Education Programs, Department of Education, 400 Maryland Avenue, SW. (Switzer Building, Room 4605), Washington, DC 20202.

A copy of any comments that concern information collection requirements should also be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble.

**FOR FURTHER INFORMATION CONTACT:** Ruth Ward. Telephone: (202) 732-1045.

**SUPPLEMENTARY INFORMATION:** The HCEEP provides Federal financial assistance for a variety of programs and activities designed to address the special problems of children with handicaps, birth through age eight—including demonstration and outreach projects, and other programs authorized under the EHA amendments of 1986 (e.g., research and training activities, research institutes, experimental programs, and a technical assistance development system.) The following are changes that have been made in the existing HCEEP regulations in order to implement the EHA amendments of 1986 (Pub. L. 99-457):

(1) Experimental programs have been added as a type of project, along with demonstration and outreach projects;

(2) Research and training activities (previously under section 624 of the EHA, but now authorized under section 623) have been added;

(3) Early childhood research institutes to carry on sustained research and to

generate and disseminate new information on preschool and early intervention programs for young children with handicaps and their families have been added;

(4) The State planning, development, and implementation grant provisions for preschool and early intervention have been deleted. Under Pub. L. 99-457, States may conduct these authorities under (1) the preschool grant program (section 619 of the EHA), and (2) the new program for infants and toddlers with handicaps.

In addition to the changes required by the statute, the proposed regulations add new selection criteria for all of the programs and activities that are authorized under this Part. With regard to training projects, the Secretary may use selection criteria under this part or Part 318 (Training Personnel for the Education of the Handicapped program). It is expected that, in general, for preservice training, the selection criteria for Part 318 will be used if appropriate for the priority. These proposed regulations do not apply to contracts which are subject to Title 48 of the Code of Federal Regulations.

A technical assistance development systems designed "to assist entities operating experimental, demonstration, and outreach programs, and to assist State agencies to expand and improve services provided to handicapped children" is now authorized under section 623 of the EHA. That system will be implemented through a Request for Proposal, (RFP), which will be published in the *Commerce Business Daily*.

## Executive Order 12291

These proposed regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the Order.

## Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations will not have a significant economic impact on a substantial number of small entities.

The small entities that would be affected by these regulations are small local educational agencies (LEAs) and public and private nonprofit organizations receiving Federal financial assistance under this program. However, the regulations would not have a significant economic impact on the small LEAs and organizations affected because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations would impose minimal requirements to ensure

the proper expenditure of program funds.

## Paperwork Reduction Act of 1980

Sections 309.20 and 309.21 contain information collection requirements. As required by section 3504(h) of the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of these proposed regulations to the Office of Management and Budget (OMB) for its review. Organizations and individuals desiring to comment on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, Room 3002, New Executive Office Building, Washington, DC 20503; Attention: Joseph F. Lackey, Jr.

## Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79. The objective of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

## Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 4605, 330 C Street, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

To assist the Department in complying with the specific requirements of Executive Order 12291 and the Paperwork Reduction Act of 1980 and their overall requirement of reducing regulatory burden, the Secretary invites comments on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.

## Assessment of Educational Impact

The Secretary particularly requests comments on whether the regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

**List of Subjects in 34 CFR Part 309**

Education, Education of the handicapped, Education—research, Grants program—education, Preschool, Reporting and record keeping requirements, Teachers.

(Catalogue of Federal Domestic Assistance Number has not been assigned.)

Dated: April 20, 1987.

William J. Bennett,

Secretary of Education.

The Secretary proposes to amend Title 34 of the Code of Federal Regulations by revising Part 309 to read as follows:

**PART 309—HANDICAPPED CHILDREN'S EARLY EDUCATION PROGRAM**

**Subpart A—General**

Sec.

309.1 What is the Handicapped Children's Early Education Program (HCEEP)?

309.2 Who is eligible for an award?

309.3 What activities may the Secretary fund?

309.4 What regulations apply to this program?

309.5 What definitions apply to this program?

**Subpart B—How Does One Apply for an Award?**

309.10 What separate applications must an applicant submit?

309.11 How does the Secretary select and announce funding priorities under this program?

**Subpart C—How Does the Secretary Make an Award?**

309.20 How does the Secretary evaluate an application?

309.21 What selection criteria does the Secretary use?

309.22 Are awards for experimental, demonstration, and outreach projects geographically dispersed?

**Subpart D—What Conditions Must Be Met After an Award?**

309.30 What conditions must be met by recipients of experimental, demonstration, and outreach projects?

309.31 What are the matching requirements for experimental, demonstration, and outreach projects?

Authority: 20 U.S.C. 1423, unless otherwise noted.

**Subpart A—General**

**§ 309.1 What is the Handicapped Children's Early Education Program (HCEEP)?**

The HCEEP supports activities that are designed—

(a) To address the special problems of children with handicaps, birth through age eight; and

(b) To assist State and local entities in expanding and improving programs and services for these children and their families.

(Authority: 20 U.S.C. 1423)

**§ 309.2 Who is eligible for an award?**

Public agencies and nonprofit private organizations are eligible for a grant or cooperative agreement under this part. In addition, profitmaking organizations are eligible under § 309.3(e) and (f).

(Authority: 20 U.S.C. 1423)

**§ 309.3 What activities may the Secretary fund?**

The Secretary may provide financial assistance in the form of a grant or cooperative agreement under this part to support the following activities:

(a) *Experimental projects.* These projects support the design of investigative models that compare alternative and innovative educational practices related to early education services for children with handicaps.

(b) *Demonstration projects.* These projects assist in developing and implementing preschool and early intervention program practices that establish specific strategies and products worthy of dissemination and replication.

(c) *Outreach projects.* These projects support the replication of established practices to assist other agencies and organizations in expanding and improving services to children with handicaps.

(d) *Research institutes.* These institutes are designed to carry on sustained research to generate and disseminate new information on preschool and early intervention programs.

(e) *Research projects.* These projects are designed to identify and meet the full range of special needs of children covered under this part.

(f) *Training projects.* These projects support the training of personnel for programs specifically designed for children with handicaps.

(Authority: 20 U.S.C. 1423)

**§ 309.4 What regulations apply to this program?**

The following regulations apply to grants and cooperative agreements under this program:

(a) The Education Department General Administrative Regulations (EDGAR) established in Title 34 of the Code of Federal Regulations in—

(1) Part 74 (Administration of Grants);

(2) Part 75 (Direct Grant Programs);

(3) Part 77 (Definitions that Apply to Department Regulations);

(4) Part 78 (Education Appeal Board); and

(5) Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(b) The regulations in this Part 309.

(Authority: 20 U.S.C. 1423)

**§ 309.5 What definitions apply to this program?**

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Applicant  
Application  
Award  
Contract  
Department  
EDGAR  
Fiscal year  
Grant  
Local educational agency  
Nonprofit  
Nonpublic  
Private  
Project  
Public  
Secretary  
State  
State educational agency

(b) *Definitions in 34 CFR Part 300.* The following terms used in this part are defined in 34 CFR Part 300. The section of Part 300 that contains the definition is given in parentheses:

Handicapped children (§ 300.5)  
Include (§ 300.6)  
Parent (§ 300.10)  
Related services (§ 300.13)  
Special education (§ 300.14)

(c) *Other definitions.* As used in this part, "Act" means the Education of the Handicapped Act, as amended.

(Authority: 20 U.S.C. 1423)

**Subpart B—How Does One Apply for an Award?**

**§ 309.10 What separate applications must an applicant submit?**

Applicants for assistance under this part must submit a separate application for each activity in § 309.3 that is announced for competition.

(Authority: 20 U.S.C. 1423)

**§ 309.11 How does the Secretary select and announce funding priorities under this program?**

The Secretary may establish as a priority any activity in § 309.3.

(Authority: 20 U.S.C. 1423)

### Subpart C—How Does the Secretary Make an Award?

#### § 309.20 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application under this part on the basis of the criteria in § 309.21.

(b) The Secretary awards up to 100 points for these criteria.

(c) The maximum possible score for each criterion is indicated in parentheses.

(Authority: 20 U.S.C. 1423)

#### § 309.21 What selection criteria does the Secretary use?

The Secretary uses the following criteria to evaluate applications unless, with regard to training projects, he determines that the selection criteria in 34 CFR Part 318 are more appropriate:

##### (a) Importance. (15 points)

(1) The Secretary reviews each application to determine the extent to which the proposed project addresses concerns in light of the purposes of this part.

##### (2) The Secretary considers—

(i) The significance of the problem or issue to be addressed;

(ii) The extent to which the project is based on previous research findings related to the problem or issue;

(iii) The numbers of individuals who will benefit; and

(iv) How the project will address the identified problem or issue.

##### (b) Impact. (15 points)

(1) The Secretary reviews each application to determine the probable impact of the proposed project in meeting the needs of children with handicaps, birth through age eight, and their families.

##### (2) The Secretary considers—

(i) The contribution that project findings or products will make to current knowledge and practice;

(ii) The methods used for dissemination of project findings or products to appropriate target audiences; and

(iii) The extent to which findings or products are replicable, if appropriate.

##### (c) Technical soundness. (35 points)

(1) The Secretary reviews each application to determine the technical soundness of the project plan.

(2) In reviewing applications under this part, the Secretary considers—

(i) The quality of the design of the project;

(ii) The proposed sample or target population, including the numbers of participants involved and methods that will be used by the applicant to ensure that participants who are otherwise eligible to participate are selected

without regard to race, color, national origin, gender, age, or handicapping condition;

(iii) The methods and procedures used to implement the design, including instrumentation and data analysis; and

(iv) The anticipated outcomes.

(3) With respect to training projects in applying the criterion in paragraph (c)(2)(iii) of this section, the Secretary considers the curriculum, course sequence, and practice leading to specific competencies;

(4) In addition to the criteria in paragraph (c)(2) of this section, the Secretary, in reviewing outreach projects, also considers—

(i) The agencies to be served through outreach activities;

(ii) The current services, their location, and anticipated impact of outreach assistance for each of those agencies;

(iii) The model demonstration project upon which the outreach project is based, including the effectiveness of the model program with children, families, or other recipients of project services; and

(iv) The likelihood that the demonstration project will be continued and supported by funds other than those available through this part.

##### (d) Plan of operation. (10 points)

(1) The Secretary reviews each application to determine the quality of the plan of operation for the project.

(2) The Secretary considers—

(i) The extent to which the management plan will ensure proper and efficient administration of the project;

(ii) Clarity in the goals and objectives of the project;

(iii) The quality of the activities proposed to accomplish the goals and objectives;

(iv) The adequacy of proposed timeliness for accomplishing those activities; and

(v) Effectiveness in the ways in which the applicant plans to use its resources and personnel to accomplish the goals and objectives.

##### (e) Evaluation plan. (5 points)

(1) The Secretary reviews each application to determine the quality of the plan for evaluating project goals, objectives, and activities.

(2) The Secretary considers the extent to which the methods of evaluation are appropriate and produce objective and quantifiable data.

##### (f) Quality of key personnel. (10 points)

(1) The Secretary reviews each application to determine the qualifications of the key personnel the applicant plans to use.

(2) The Secretary considers—

(i) The qualifications of the project director and project coordinator (if one is used);

(ii) The qualifications of each of the other key project personnel;

(iii) The time that each person referred to in paragraphs (f)(2)(i) and (ii) of this section will commit to the project; and

(iv) How the applicant will ensure that personnel are selected for employment without regard to race, color, national origin, gender, age, or handicapping condition.

(3) The Secretary considers experience and training in areas related to project goals to determine qualifications of key personnel.

##### (g) Adequacy of resources. (5 points)

(1) The Secretary reviews each application to determine adequacy of resources allocated to the project.

(2) The Secretary considers the adequacy of the facilities and the equipment and supplies that the applicant plans to use.

##### (h) Budget and cost-effectiveness. (5 points)

(1) The Secretary reviews each application to determine if the project has an adequate budget.

(2) The Secretary considers the extent to which—

(i) The budget for the project is adequate to undertake project activities; and

(ii) Costs are reasonable in relation to objectives of the project.

(Authority: 20 U.S.C. 1423)

#### § 309.22 Are awards for experimental, demonstration, and outreach projects geographically dispersed?

To the extent feasible, the Secretary, in addition to using the selection criteria in § 309.21, geographically disperses awards for experimental, demonstration, and outreach projects throughout the Nation in urban as well as rural areas.

(Authority: 20 U.S.C. 1423(a)(3))

### Subpart D—What Conditions Must Be Met After an Award?

#### § 309.30 What conditions must be met by recipients of experimental, demonstration, and outreach projects?

(a) Experimental, demonstration, and outreach projects must include services and activities that are designed to—

(1) Facilitate the intellectual, emotional, physical, mental, social, speech, language development, and self-help skills of children with handicaps, birth through age eight;

(2) Encourage the participation of the parents of those children in the

development and operation of projects under this part;

(3) Acquaint the community in which the project is located with the problems and potentialities of those children;

(4) Offer training about exemplary models and practices to State and local personnel who provide services to children with handicaps, birth through age eight; and

(5) Support the adoption of exemplary models and practices in States and local communities.

(b) Experimental, demonstration, and outreach projects must be coordinated with State and local educational

agencies, and appropriate public and private health and social service agencies, in order to—

(1) Inform those agencies of the nature and purposes of the assisted project's activities or services; and

(2) Provide opportunities for the project staff to coordinate their activities with staff of other agencies.

(Authority: 20 U.S.C. 1423(a) (1), (2))

**§ 309.31 What are the matching requirements for experimental, demonstration, and outreach projects?**

(a) Federal financial participation for an experimental, demonstration, or

outreach project may not exceed 90 percent of the total annual costs of development, operation, and evaluation of the project.

(b) The Secretary may waive the matching requirement in paragraph (a) of this section in the case of an arrangement entered into with governing bodies of Indian tribes located on Federal or State reservations and with consortia of those bodies if they are able to demonstrate that insufficient resources are available.

(Authority: 20 U.S.C. 1423(a)(4))

[FR Doc. 87-10939 Filed 5-12-87; 8:45 am]

BILLING CODE 4000-01-M

**DEPARTMENT OF EDUCATION**  
**Office of Special Education and**  
**Rehabilitative Services**

[CFDA No: 84.024A]

**Invitation for Applications for New**  
**Awards Under the Handicapped**  
**Children's Early Education Program**  
**(HCEEP) for Fiscal Year 1987**

*Purpose:* To provide Federal financial assistance for experimental or demonstration projects authorized under the Handicapped Children's Early Education Program.

*Deadline for Transmittal of Applications:* July 2, 1987.

*Deadline for Intergovernmental Review Comments:* September 2, 1987.

*Applications Available:* May 29, 1987.

*Estimated Range of Awards:* \$75,000-\$125,000.

*Estimated Average Size of Awards:* \$100,000.

*Estimated Number of Awards:* 11.

*Project Period:* Up to 36 months.

*Priorities:* In accordance with 34 CFR 75.105(c)(3), the Secretary is establishing an absolute priority for the following categories: (1) Demonstration projects that assist in developing and implementing preschool and early intervention program practices that establish specific strategies and products worthy of dissemination and replication; and (2) experimental projects which support the design of investigative models that compare alternative and innovative educational practices related to early education services for children with handicaps. The Secretary particularly invites applications that address early intervention practices, service delivery strategies, or public policies, with the potential to improve early intervention for children with handicaps, birth through age two. However, in accordance with the Education Department General Administrative Regulations (EDGAR) at 34 CFR 75.105(c)(1), an application submitted under this notice that meets this invitational priority will not be given a competitive or absolute preference over other applications.

*Applicable Regulations:* (a) When adopted in final form, the proposed regulations, Handicapped Children's Early Education Program, 34 CFR Part 309, published in this issue of the Federal Register. Applicants should base their applications on the proposed regulations. If substantive changes are made in the final regulations applicants will be given an opportunity to revise or resubmit their applications. (b) Education Department General

Administrative Regulations (EDGAR) (34 CFR Parts 74, 75, 77, 78, and 79).

*For Applications or Information Contact:* Thomas E. Finch, U.S. Department of Education, Office of Special Education Programs, 400 Maryland Avenue, SW., Room 4611, Switzer Building, Washington, DC 20202. Telephone: (202) 732-1084.

*Program Authority:* 20 U.S.C. 1423.

*Dated:* May 8, 1987.

Madeleine Will,

*Assistant Secretary, Office of Special Education and Rehabilitative Services.*

[FR Doc. 87-10940 Filed 5-12-87; 8:45 am]

BILLING CODE 4000-01-M

**Handicapped Children's Early**  
**Education Program; Final Annual**  
**Funding Priorities**

**AGENCY:** Department of Education.

**ACTION:** Notice of final annual funding priorities.

**SUMMARY:** The Secretary announces annual funding priorities for the Handicapped Children's Early Education Program.

**EFFECTIVE DATE:** These final annual funding priorities take effect either 45 days after publication in the Federal Register or later if Congress takes certain adjournments. If you want to know the effective date of these final annual priorities, call or write the Department of Education contact person.

**FOR FURTHER INFORMATION CONTACT:** The person listed on each individual proposed priority.

**SUPPLEMENTARY INFORMATION:** The Handicapped Children's Early Education Program (HCEEP) was established under Pub. L. 91-230 on April 13, 1970, and is currently authorized by section 623 of Part C of the Education of the Handicapped Act (EHA), as amended most recently by Pub. L. 99-457. The purpose of the program is to support experimental preschool and early childhood demonstration, outreach, training, and research projects. The focus of these competitions is on: (1) the development of model demonstration, replication, and dissemination projects to assist in developing and implementing innovative and experimental practices that establish specific strategies and products worthy of dissemination and replication; (2) the training of personnel to work with handicapped children through age two; and (3) research on program components for promoting language or social development of handicapped children within the age range of birth through five years.

A notice of proposed annual funding priorities for the Handicapped Children's Early Education Program (HCEEP) and a notice soliciting applications for those priorities was published in the Federal Register on August 27, 1986, at 51 FR 30622. That notice contained two proposed priorities for: (a) Community Involvement Demonstrations, and (b) Severely Handicapped Infants Demonstrations. Another notice of proposed annual funding priorities for Auxiliary Activities—Research and Training for the Handicapped Children's Early Education Program and a notice soliciting applications for the training priority was published in the Federal Register on September 23, 1986, at 51 FR 33850. That notice contained two proposed priorities for: (a) Research on Early Childhood Program Features, and (b) In-Service Training. These last two priorities were published under the authority of section 624 of the Education of the Handicapped Act to support early childhood activities, because section 624 authorized funding of in-service training and research. However, The Education of the Handicapped Act Amendments of 1986, Pub. L. 99-457, transferred the authority for training and research activities to the Handicapped Children's Early Education Program (section 623). Therefore, this notice combines the two previous notices of proposed annual funding priorities into one final notice of annual priorities.

As noted above, when Congress reauthorized the Education of the Handicapped Act, the authority to conduct training and research activities for early childhood programs was transferred from section 624 to section 623. However, the authority remains identical. Therefore, the eligibility requirements and selection criteria under the current regulations implementing section 624 at 34 CFR 315.2 and 315.31 will apply to the fiscal year 1987 training competition.

For the fiscal year 1987 research competition the Secretary is planning to use new proposed selection criteria for research projects under section 623. These criteria will be published in the Notice of Proposed Rulemaking for the Handicapped Children's Early Education Program. Therefore, the Secretary will publish an application notice soliciting applications for the research priority with that Notice of Proposed Rulemaking.

Application packages for all fiscal year 1987 competitions will reflect the statutory changes made by the Education of the Handicapped Act Amendments of 1986.

Finally, a change has been made as a result of the amendment to section 623, which no longer authorizes Early Childhood State Plan Grants. The reference to collaboration with the Early Childhood State Plan Grant in the priorities section has been deleted. The amendment to the Pre-school Incentive Grant Program permits States to use part of their funds for activities similar to the planning and development activities previously authorized under section 623. Therefore, applications submitted under priorities 1 and 2 now demonstrate collaboration with State-wide planning activities for early childhood programs such as planning and development activities funded under section 619(c) of the Education of the Handicapped Act.

Awards will be made in each priority area described below. The Secretary may award grants or cooperative agreements.

#### Summary of Comments and Responses

The public was given thirty days in which to comment on each of the notices of proposed priorities. Comments were received from two professional organizations, both of which supported the priorities. Therefore, no changes have been made.

#### Priorities

In accordance with the Education Department General Administrative Regulations at 34 CFR 75.105(c)(3) and subject to available funds, the Secretary will give an absolute preference to each application submitted in response to one of the following priorities. Applications submitted under Priorities 1 and 2 must demonstrate innovative and experimental approaches to the education of handicapped children and demonstrate collaboration with the State-wide planning activities for early childhood programs such as planning and development activities funded under section 619(c). Each application submitted under any of the four priorities must provide satisfactory assurance that the recipient will use funds made available to conduct one of the following activities:

#### Priority 1—Community Involvement Demonstrations

This priority would support projects which demonstrate innovative and experimental approaches to the delivery of effective, comprehensive services to handicapped children from birth through age five (0-5) and their families. Projects under this priority must demonstrate a team approach (such as special education, health and social service

agencies) in the planning and delivery of comprehensive services. Projects must also demonstrate a commitment to train parents and family members to facilitate team efforts to deliver effective services.

**FOR FURTHER INFORMATION CONTACT:** Dr. Thomas E. Finch, Early Childhood Branch, Division of Educational Services, Office of Special Education Programs, Department of Education, 400 Maryland Avenue, SW (Switzer Building, Room 3094-M/S 2313), Washington, DC 20202. Telephone: (202) 732-1084.

#### Priority 2—Severely Handicapped Infants Demonstrations

This priority supports projects which demonstrate innovative and experimental methods of effectively serving handicapped infants from birth through two years (0-2) who have multiple handicaps or who are medically fragile. Projects must demonstrate provision of these services in the community and in the least restrictive environment with emphasis on home care models.

**FOR FURTHER INFORMATION CONTACT:** Dr. Thomas E. Finch, Early Childhood Branch, Division of Educational Services, Office of Special Education Programs, Department of Education, 400 Maryland Avenue, SW. (Switzer Building, Room 3094-M/S 2313), Washington, DC 20202. Telephone: (202) 732-1084.

#### Priority 3—In-Service Training

This priority supports projects that demonstrate innovative and experimental in-service training programs that focus on meeting the need for qualified personnel to provide services to handicapped and children who are at risk of becoming handicapped from birth through age two. Personnel to be trained under this priority would include, but not be limited to: pediatricians and neonatal caregivers (nurses, social workers, physical therapists, occupational therapists, speech pathologists, public health personnel, and parents). Within this priority projects must focus on one or more of the following:

(a) Establishing an inservice training program which focuses on training personnel to work as a team with handicapped children from birth through age two;

(b) Ensuring the development of a curriculum which includes a multi-agency approach to service delivery for handicapped children from birth through age two; or

(c) Ensuring the development of a curriculum which includes a focus on the role of the family and skills the family needs to participate in the delivery of service as part of a team working with handicapped children from birth through age two.

**FOR FURTHER INFORMATION CONTACT:** Dr. Thomas E. Finch, Early Childhood Branch, Division of Educational Services, Office of Special Education Programs, Department of Education, 400 Maryland Avenue SW., (Switzer Building, Room 3094 M/S 2313), Washington, DC 20202. Telephone (202) 732-1084.

#### Priority 4—Research on Early Childhood Program Features

To provide effective and replicable services for handicapped infants and preschool aged children, there is a major need for research to identify the most effective methods and materials for promoting children's progress in different developmental domains (e.g., social, language, motor). Presently, much of the available information on the effectiveness of services is limited to entire programs; little information is available on the comparative effectiveness of different program components for promoting, for example, language development of handicapped children, yet many professionals who are planning to establish a service program prefer to review and assemble components from several programs rather than to adopt an entire program. Similarly, many professionals who are now operating a service program desire to replace certain components of their program with more effective ones.

There are currently available several well-defined program components for promoting language development of young handicapped children and several well-defined program components for promoting social development of handicapped children. These components vary significantly in such matters as conceptual/theoretical bases, instructional procedures, and instructional materials. Although much is known about these components, information is generally not available on their relative effectiveness as indexed by a variety of measures of child progress.

This priority supports projects that use a variety of measures of child progress to compare the effectiveness of several (minimum of 3) program components for promoting (1) language development, or (2) social development

of handicapped children within the age range of birth through five years. These components must be well-defined sets of instructional goals and procedures which can be incorporated within planned or existing preschool programs of varying types. The components selected for study must be compared in multiple studies and in different types of existing preschool programs. Applicants must fully describe the components that will be studied, the justification for their selection, and the existing preschool programs in which they will be studied. In conducting the studies, projects must monitor the amount and quality of implementation of the components, as well as the children's experiences in other components of the program. Included within the research activities should be a plan for conducting studies to determine whether the initial findings can be replicated, and a plan for documenting the costs and other resources necessary to incorporate the components in different kinds of preschool programs. The goal of these research projects would be to provide information about the relative effects of the components studied, and to provide to professionals replicable components that can be incorporated in new or existing infant or preschool programs.

**FOR FURTHER INFORMATION CONTACT:** Linda Glidewell, Division of Innovation and Development, Office of Special Education Programs, Department of Education, 400 Maryland Avenue SW., (Switzer Building, Room 3094—M/S

#### Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79 (48 FR 29158; June 24, 1983). The objective of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism by relying on State and local processes for State and local governmental coordination and review of proposed Federal financial assistance.

In accordance with the Order, this document is intended to provide early notification of the Department's specific plans and actions for this program. (20 U.S.C. 1423)

(Catalog of Federal Domestic Assistance Number 84.024; Handicapped Children's Early Education Program)

Dated: April 3, 1987.

William J. Bennett,

Secretary of Education.

[FR Doc. 87-10941 Filed 5-12-87; 8:45 am]

BILLING CODE 4000-01-M

#### [CFDA 84.024W]

### Invitation for Applications for New Awards Under the Handicapped Children's Early Education Program for Fiscal Year 1987

**Purpose:** To provide support for research activities that meet the unique early educational needs of handicapped children.

**Deadline for Transmittal of Applications:** June 30, 1987.

**Deadline for Intergovernmental Review Comments:** August 31, 1987.

**Applications Available:** May 20, 1987.

**Estimated Range of Awards:** \$200,000—\$300,000.

**Estimated Average Size of Awards:** \$250,000.

**Estimated Number of Awards:** 4.

**Project Period:** Up to 48 months.

**Applicable Regulations:** (a) When adopted in final form, the Notice of Proposed Rulemaking for the Handicapped Children's Early Education Program published in this issue of the **Federal Register**. Applicants should prepare their applications based on the proposed regulations. If the final regulations contain substantive changes, applicants will be given the opportunity to amend or resubmit their applications. (b) The Education Department General Administrative Regulations, 34 CFR Parts 74, 75, 77, 78, and 79, and (c) The Notice of Final Annual Funding Priorities published in this issue of the **Federal Register**.

**For Applications or Information Contact:** Linda Glidewell, Division of Innovation and Development, Office of Special Education Programs, Department of Education, 400 Maryland Avenue, SW. (Switzer Building, Room 3094—M/S 2313), Washington, DC 20202. Telephone: (202) 732-1099.

**Program Authority:** 20 U.S.C. 1423.

**Dated:** May 8, 1987.

Madeleine Will,

Assistant Secretary Office of Special Education and Rehabilitative Service.

[FR Doc. 87-10942 Filed 5-12-87; 8:45 am]

BILLING CODE 4000-01-M

#### Office of Special Education and Rehabilitative Services

### Handicapped Children's Early Education Program

**AGENCY:** Department of Education.

**ACTION:** Notice of proposed annual funding priorities.

**SUMMARY:** The Secretary proposes annual funding priorities for the Handicapped Children's Early

Education Program. These priorities would support early childhood research institutes required by the Education of the Handicapped Act, as amended by the Education of the Handicapped Act Amendments of 1986, Pub. L. 99-457.

**DATE:** Comments must be received on or before June 12, 1987.

**ADDRESS:** Comments should be addressed to: Linda Glidewell, Division of Innovation and Development, Office of Special Education Programs, Department of Education, 400 Maryland Avenue, SW. (Switzer Building, Room 3094—M/S 2313), Washington, DC 20202.

**FOR FURTHER INFORMATION CONTACT:** Linda Glidewell, Telephone: (202) 732-1099.

**SUPPLEMENTARY INFORMATION:** The Handicapped Children's Early Education Program (HCEEP) was established under Pub. L. 91-230 on April 13, 1970, and is currently authorized by section 623 of Part C of the Education of the Handicapped Act, as amended. The purpose of the program is to support a variety of activities designed to address the special problems of handicapped children from birth through age eight including experimental, demonstration, and outreach projects, research and training activities, early childhood research institutes, and a technical assistance development system. These priorities would establish two early childhood research institutes. The first institute would be established to develop new or improved interventions for infants and toddlers with handicaps who, because of the nature of their disabilities, require extended medical care in hospital intensive care units and who may require life-supporting technologies and systems of health care. The second institute would be established to develop, evaluate, and disseminate new or improved curricula and materials (for preservice, inservice, and self-study use) for training special education and related service personnel to deliver intervention services to infants and toddlers with handicaps and their families.

#### Proposed Priorities

In accordance with the Education Department General Administrative Regulations at 34 CFR 75.105(c)(3), and subject to available funds, the Secretary proposes to give an absolute preference to each application submitted in response to one of the following priorities. Each application must provide satisfactory assurance that the recipient

will use funds made available to conduct one of the following activities:

*Priority 1: Early Childhood Research Institute—Intervention*

This proposed priority would establish an Early Childhood Research Institute to develop new or improved interventions for infants and toddlers with handicaps who, because of the nature of their disabilities, require extended medical care in hospital intensive care units and who may require life-supporting technologies and systems of health care. The institute's purpose would be to conduct a program of research and development designed to produce information and materials that can be used in concert with the provision of intensive health care and that promote the developmental progress of these children. The institute's research and development activities must produce information and materials that can be used within intensive care units and that facilitate the successful transition of the child to the home and to community-based services. The research and development activities must consist of two major areas of inquiry.

First, the institute must conduct a program of research to develop new or improved procedures related to the identification, referral, and intervention process. The institute's research must include, but need not be limited to, studies that: (1) Develop exemplary practices related to physician referral, initial family counseling, and tracking of the child's progress and services; (2) identify effective practices and procedures for forming and involving a multidisciplinary team to plan services for the child and family; (3) establish criteria and procedures for enlisting the services of different State agencies, including the State Protection and Advocacy agency or other child protection groups; (4) develop exemplary models for determining the point in the child's life when nonmedical interventions can be appropriately and safely implemented; (5) identify a variety of effective nonmedical interventions that are keyed to child developmental needs, child medical needs, family needs and characteristics, and the potential for delivering these services within a hospital intensive care unit; and (6) develop new or improved interventions that will facilitate the transition of the child to the home and to community-based services.

Second, the institute must conduct a program of research to develop new or improved organizational structures related to the identification, referral, and intervention process. The institute's

research must include, but need not be limited to, studies that: (1) Identify the full range of services and personnel needed in a comprehensive hospital-based intensive care unit; (2) develop model organizational structures (including roles, responsibilities, lines of authority, communication, and coordination) for a comprehensive hospital-based intensive care unit; (3) identify exemplary models for involving parents, siblings, friends, and extended family with a multi-disciplinary team; (4) develop procedures to prevent or solve role conflicts among team members; and (5) identify alternative approaches to team composition and team member roles in providing intervention and transitional services.

In carrying out its research activities, the institute must provide research training and experience for at least 10 graduate students annually.

In addition to conducting the activities described above, the institute must commit approximately 20% of its budget to inservice training activities. These training activities must be designed to assist hospital intensive care unit staff to learn about new or improved procedures and organizational structures to serve infants and toddlers with handicaps and their families. The training activities must be based on the results of the institute's research findings, already published information, and existing exemplary procedures and organizational structures.

*Priority 2: Early Childhood Research Institute—Personnel*

This proposed priority would establish an Early Childhood Research Institute to develop, evaluate, and disseminate new or improved curricula and materials (for preservice, inservice, and self-study use) for the training of special education and related service personnel to deliver intervention services to infants and toddlers with handicaps and their families. The goal of the institute would be to produce validated, replicable training curricula that can be used across settings, disciplines, and disciplinary training programs to prepare personnel to deliver effective services and to work effectively within multi-disciplinary teams. The final materials must be developed for broad application, including their use by existing training programs that currently prepare no specialists for this age group.

In developing new or improved training curricula and materials, the institute is expected to work with institutions of higher education and other agencies that have nationally recognized training programs in one or

or more of the relevant disciplinary areas (special education, speech/language and audiology, occupational therapy, physical therapy, psychology, social work, nursing, or nutrition). To take advantage of current best practices, institute researchers shall examine the curricula and materials now being implemented in exemplary training programs and use these as a point of departure in the institute's research and development program. In developing a series of training modules for each special education and related service area, the institute must, where appropriate, take advantage of overlap and commonalities in training content. The institute must also develop the curricula and materials in a manner that is responsive to different training uses. For example, some potential trainers will view their trainees as specialists not generalists. In those instances, the curricula and materials must be sufficiently flexible to accommodate this training approach, but contain enough information about other disciplines to enable effective communication and coordination of services. In other instances, the training program may be aimed at producing trainees for more generalist roles, such as those that may be required in rural areas, in which more extensive knowledge of delivering different services is required. In either instance, however, the training curricula and materials must develop trainee skills in working with parents and families, interacting with professionals from other disciplines, determining when other specialists must be consulted, developing an individualized family service plan, and accessing emerging information and research findings in the trainee's own and related disciplinary areas.

For each disciplinary area the institute must conduct a series of evaluation studies of the different versions of the training materials. In addition to addressing other goals and objectives established for the evaluations, curricula and material must be evaluated with respect to their effectiveness in preservice, inservice, and self-study applications.

In carrying out its research and development activities, the institute must provide research training and experience for at least 10 graduate students annually.

In addition to conducting the activities described above, the institute must commit approximately 20% of its budget to inservice training activities. These training activities must be designed to assist personnel in institutions of higher education and other agencies in learning

about effective training curricula and materials for this population. The training activities must be based on the results of the institute's research and development activities, already published information about training programs, and existing exemplary training programs.

#### *Period of Award*

The Secretary will approve cooperative agreements with a project period of 60 months subject to the requirements of 34 CFR 75.253(a) for continuation awards. In determining whether to continue the institute for the last two years of the project period, in addition to considering the factors in 34 CFR 75.253(a), the Secretary will also consider the recommendation of a review team consisting of three external experts selected by the Secretary and designated Federal program officials. The services of the review team are to be performed during the last half of the institute's second year, and will replace that year's annual evaluation which the recipient is required to perform under 34 CFR 75.590. During all other years of the project, the recipient must comply with 34 CFR 75.590. Costs associated with the services to be performed by the three external members of the review team are to be incorporated into the applicant's proposed budget. In developing its recommendation, the review team will consider, among other factors, the following:

(1) The timeliness and the effectiveness with which all requirements of the negotiated cooperative agreement have been or are being met by the recipient of the cooperative agreement and its subgrantees; and

(2) The degree to which the institute's research design and methodological procedures demonstrate the potential for producing significant new knowledge and products.

#### **Invitation to Comment**

Interested persons are invited to submit comments and recommendations regarding these proposed priorities. All comments submitted in response to these priorities will be available for public inspection, during and after the comment period, in Room 3522, Switzer Building, 330 C Street SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

(20 U.S.C. 1423)

(Catalog of Federal Domestic Assistance Number 84.024: Handicapped Children's Early Education Program)

Dated: April 13, 1987.

William J. Bennett,

Secretary of Education.

[FR Doc. 87-10943 Filed 5-12-87; 8:45 am]

BILLING CODE 4000-01-M

[CFDA No.'s: 84.024XB, and XC]

#### **Invitation for Applications for New Awards Under the Handicapped Children's Early Education Program for Fiscal Year 1987**

*Purpose:* To establish two early childhood research institutes.

*Deadline for Transmittal of*

*Applications:* June 30, 1987.

*Deadline for Intergovernmental*

*Review Comments:* August 31, 1987.

*Applications Available:* May 20, 1987.

*Available Funds:* \$2.4 million for 24 mo.

*Estimated Range of Awards:* \$550,000-\$650,000 per year.

*Estimated Number of Awards:* 2 cooperative agreements.

*Project Period:* Up to 60 months.

*Applicable Regulations:* (a) When adopted in final form, the Notice of Proposed Rulemaking for the Handicapped Children's Early Education Program published in this issue of the **Federal Register**, (b) the Education Department General Administrative Regulations, 34 CFR Parts 74, 75, 77, 78, and 79, and (c) when adopted in final form, the Annual Funding Priorities for this program. A notice of proposed annual funding priorities is published in this issue of the **Federal Register**. Applicants should prepare their applications based on the proposed regulations and the proposed priorities. If there are substantive changes made when the final regulations and final annual funding priorities are published, applicants will be given the opportunity to amend or resubmit their applications.

*For Applications or Information Contact:* Linda Glidewell, Division of Innovation and Development, Office of Special Education Programs, Department of Education, 400 Maryland Avenue, SW. (Switzer Building, Room 3094-M/S 2313), Washington, DC 20202. Telephone: (202) 732-1099.

*Program Authority:* 20 U.S.C. 1423.

Dated: May 8, 1987.

Madeleine Will,

Assistant Secretary, Office of Special Education and Rehabilitative Services.

[FR Doc. 87-10944 Filed 5-12-87; 8:45 am]

BILLING CODE 4000-01-M

# Get the federal part

Wednesday  
May 13, 1987

## Part IX

## Department of Education

34 CFR Part 237

Christa McAuliffe Fellowship Program;  
Proposed Rule

## DEPARTMENT OF EDUCATION

## 34 CFR Part 237

## Christa McAuliffe Fellowship Program

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** The Secretary proposes to issue regulations governing the Christa McAuliffe Fellowship Program for outstanding teachers currently authorized by Title V, Part D, Subpart 2 of the Higher Education Act of 1965, as amended by the Higher Education Amendments of 1986. These proposed regulations would specify the responsibilities of the Secretary in administering the program, the duties of State panels in selecting fellows, and the terms and conditions that apply to recipients of the fellowship awards.

**DATE:** Comments must be received on or before June 12, 1987.

**ADDRESSES:** All comments concerning these proposed regulations should be addressed to Ms. Willi Webb, Director, Policy, Planning, and Executive Operations, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue SW., Room 2189, Washington, DC 20202.

A copy of any comments that concern information collection requirements should also be sent to the Office of Management and Budget (OMB) as follows: Office of Information and Regulatory Affairs, OMB, Room 3002, New Executive Office Building, Washington, DC 20503; Attention: Joseph F. Lackey, Jr.

**FOR FURTHER INFORMATION CONTACT:** Ms. Willi Webb, telephone (202) 732-4988.

**SUPPLEMENTARY INFORMATION:** The Christa McAuliffe Fellowship Program is authorized by Title V, Part D, Subpart 2 of the Higher Education Act of 1965, as amended by the Higher Education Amendments of 1986. It establishes a national fellowship program for outstanding full-time public and private school teachers. These teachers may use awards for projects approved by the Secretary to improve their knowledge or skills and the education of their students, including (1) sabbaticals for study or research directly associated with the objectives of the statute, or their own academic improvement, (2) consultation with or assistance to other school districts or private school systems, (3) development of special innovative programs, or (4) model teacher programs and staff development.

## Executive Order 12291

These proposed regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

## Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. The small entities that would be affected by these regulations are local educational agencies (LEAs) which are required to comment on the proposals submitted to the statewide panel. However, the regulations would not have a significant economic impact on the LEAs affected because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations would impose minimal requirements to ensure the proper expenditure of program funds.

## Paperwork Reduction Act of 1980

These regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

## Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 2189, FOB-6, 400 Maryland Avenue SW., Washington, DC 20202, between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

To assist the Department in complying with the specific requirements of Executive Order 12291 and the Paperwork Reduction Act of 1980 and their overall requirement of reducing regulatory burden, the Secretary invites comments on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.

## Assessment of Educational Impact

The Secretary particularly requests comments on whether the regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

## List of Subjects in 34 CFR Part 237

College and universities, Education, Elementary and secondary education, Scholarships and fellowships, Reports and recordkeeping requirements, Teachers.

(Catalog of Federal Domestic Assistance Number 84.190, Christa McAuliffe Fellowship Program)

Dated: April 30, 1987.

William J. Bennett,  
Secretary of Education.

The Secretary proposes to amend Title 34 of the Code of Federal Regulations by adding a new Part 237 to read as follows:

## PART 237—CHRISTA MCAULIFFE FELLOWSHIP PROGRAM

## Subpart A—General

Sec.

- 237.1 What is the Christa McAuliffe Fellowship Program?
- 237.2 Who is eligible to apply under the Christa McAuliffe Fellowship Program?
- 237.3 How are awards distributed?
- 237.4 In what amount are fellowships awarded?
- 237.5 For what purposes may a fellow use an award?
- 237.6 What priorities may the Secretary establish?
- 237.7 What regulations apply?
- 237.8 What definitions apply?

## Subpart B—How Does One Apply For An Award?

- 237.10 How does an individual apply for a fellowship?

## Subpart C—How Are Fellows Selected?

- 237.20 What are statewide panels?
- 237.21 What are the responsibilities of a statewide panel?

## Subpart D—What Conditions Must Be Met By Fellows?

- 237.30 What is the duration of a fellowship?
- 237.31 May a fellowship be awarded for two consecutive years?
- 237.32 What records and reports are required from fellows?
- 237.33 What is the service requirement for a fellowship?
- 237.34 What are the requirements for repayment of the fellowship?

Authority: 20 U.S.C. 1113-1113e, unless otherwise noted.

## Subpart A—General

## § 237.1 What is the Christa McAuliffe Fellowship Program?

The Christa McAuliffe Fellowship Program (CMFP) is designed to reward excellence in teaching by encouraging outstanding teachers to continue their education, to develop innovative programs, to consult with or assist LEAs, private schools, or private school systems, and to engage in other

educational activities that will improve the knowledge and skills of teachers and the education of students.

(Authority: 20 U.S.C. 1113, 1113b)

**§ 237.2 Who is eligible to apply under the Christa McAuliffe Fellowship Program?**

An individual is eligible to apply for a Christa McAuliffe Fellowship if the individual at the time of application—

(a)(1) Is a citizen or national of the United States;

(2) Is a permanent resident of the United States;

(3) Provides evidence from the Immigration and Naturalization Service that the individual is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident; or

(4) Is a permanent resident of the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, or the Northern Mariana Islands; and

(b) Is a full-time teacher in a public or private elementary or secondary school.

(Authority: 20 U.S.C. 1113b, 1113d(a))

**§ 237.3 How are awards distributed?**

(a) Except as provided in section 563(a)(3) of the Act, the Secretary awards one national teacher fellowship under this part to an eligible teacher in each of the following:

(1) Each congressional district in each of the fifty States.

(2) The District of Columbia.

(3) The Commonwealth of Puerto Rico.

(4) Guam.

(5) The Virgin Islands.

(6) American Samoa.

(7) The Northern Mariana Islands.

(8) The Trust Territory of the Pacific Islands.

(b)(1) If the conditions stated in section 563(a)(3) of the Act apply, the Secretary publishes an alternative distribution of fellowships under this part that—

(i) Will permit fellowship awards at the level stated in § 237.4; and

(ii) Is geographically equitable as determined by the Secretary.

(2) The Secretary sends a notice of this distribution to each of the statewide panels established under § 237.20.

(Authority: 20 U.S.C. 1113b(a))

**§ 237.4 In what amount are fellowships awarded?**

A fellowship awarded under this part may not exceed the average national salary of public school teachers in the most recent year for which satisfactory data are available, as determined by the Secretary.

(Authority: 20 U.S.C. 1113b(a)(2))

**§ 237.5 For what purposes may a fellow use an award?**

Christa McAuliffe fellows may use fellowships awarded under this part for projects to improve education including:

(a) Sabbaticals for study or research directly associated with objectives of this part, or academic improvement of the fellows.

(b) Consultation with or assistance to LEAs, private schools, or private school systems other than those with which the fellow is employed or associated.

(c) Development of special innovative programs.

(d) Model teacher programs and staff development.

(Authority: 20 U.S.C. 1113b(b))

**§ 237.6 What priorities may the Secretary establish?**

(a) The Secretary may annually establish, as a priority, one or more of the projects listed in § 237.5.

(b) The Secretary announces any annual priorities in a notice published in the *Federal Register*.

(Authority: 20 U.S.C. 1113d(a))

**§ 237.7 What regulations apply?**

The following regulations apply to the Christa McAuliffe Fellowship Program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 77 (Definitions That Apply to Department Regulations).

(b) The regulations in this Part 237.

(Authority: 20 U.S.C. 1113d(a))

**§ 237.8 What definitions apply?**

(a) The following definitions apply to terms used in this part:

"Act" means the Higher Education Act of 1965, as amended.

"Fellow" means a fellowship recipient under this part.

"Fellowship" means an award made to a person under this part.

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

EDGAR

Elementary school

Private

Public

Secondary school

Local educational agency

State educational agency

Secretary

Department

(Authority: 20 U.S.C. 1113d(a))

**Subpart B—How Does One Apply For An Award?**

**§ 237.10 How does an individual apply for a fellowship?**

(a) To apply for a fellowship under this part, an individual must submit an

application containing a proposal for a fellowship project as described in § 237.5, indicating the extent to which the applicant wishes to continue current teaching duties.

(b) The applicant shall provide this application to the appropriate LEA for comment prior to submission to the statewide panel for the State within which the proposal project is to be conducted as described in § 237.20.

(c) The applicant shall submit the application to the statewide panel within the deadline established by the panel.

(Authority: 20 U.S.C. 1113c, 1113d(a))

**Subpart C—How Are Fellows Selected?**

**§ 237.20 What are statewide panels?**

(a) Recipients of Christa McAuliffe Fellowships in each State are selected by a seven-member statewide panel appointed by the chief State elected official, acting in consultation with the State educational agency (SEA), or by an existing panel designated by the chief State elected official and approved by the Secretary.

(b) The statewide panel must be representative of school administrators, teachers, parents, and institutions of higher education.

(Authority: 20 U.S.C. 1113c)

**§ 237.21 What are the responsibilities of a statewide panel?**

(a) Each statewide panel has the responsibility for—

(1) Establishing its own operating procedures regarding the fellowship selection process; and

(2) Disseminating information and application materials to the LEAs, private schools, and private school systems regarding the fellowship competition.

(b) Each panel may impose reasonable administrative requirements for the submission, handling, and processing of applications.

(c) Each statewide panel must consult with the appropriate LEA in evaluating proposals from applicants.

(d) In their applications to the statewide panel, individuals must include—

(1) Two recommendations from teaching peers;

(2) A recommendation from the principal; and

(3) A recommendation from the superintendent on the quality of the proposal and its educational benefit.

(3) A statewide panel may establish additional criteria, consistent with the

Act, for the award of fellowships in its area as it considers appropriate.

(f) A statewide panel shall submit to the Secretary its selections for recipients of fellowships under this part within the schedule established by the Secretary.

(Authority: 20 U.S.C. 1113d)

#### **Subpart D—What Conditions Must Be Met By Fellows?**

##### **§ 237.30 What is the duration of a fellowship?**

An individual may receive a Christa McAuliffe Fellowship under this program for up to 12 months.

(Authority: 20 U.S.C. 1113d(a))

##### **§ 237.31 May a fellowship be awarded for two consecutive years?**

A Christa McAuliffe fellow may not

receive an award for any two consecutive years.

(Authority: 20 U.S.C. 1113b(a)(2))

##### **§ 237.32 What records and reports are required from fellows?**

Each fellow shall keep any records and submit any reports that are required by the Secretary.

(Authority: 20 U.S.C. 1113d(a))

##### **§ 237.33 What is the service requirement for a fellowship?**

A fellow must return to a teaching position in the fellow's current LEA, private school, or private school system for at least two years following the completion of the fellowship.

(Authority: 20 U.S.C. 1113b(a)(2), 1113d)

##### **§ 237.34 What are the requirements for repayment of the fellowship?**

(a) If a fellow does not carry out the activities described in the approved application or does not comply with § 237.33, the fellow shall make repayment in accordance with this section.

(b) The Secretary prorates the amount a fellow is required to repay based on the length of time the fellow carried out the fellowship activities, and held a teaching position in accordance with § 237.33 compared to the length of time that would have been involved if the fellow had fully met these requirements.

(Authority: 20 U.S.C. 1113e)

[FR Doc. 87-10945 Filed 5-12-87; 8:45 am]

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The text of laws is not published in the **Federal Register** but may be ordered in individual pamphlet form (referred to as "slip laws") from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone 202-275-3030).

**H.R. 240/Pub. L. 100-35**

To amend the National Trails System Act to designate the Santa Fe Trail as a National Historic Trail. (May 8, 1987; 101 Stat. 302; 1 page) Price: \$1.00

